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### Common-Law and Statutory Solutions to the Problem of SLAPPS

John C. Barker

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# COMMON-LAW AND STATUTORY SOLUTIONS TO THE PROBLEM OF SLAPPS

*John C. Barker\**

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## I. INTRODUCTION

Strategic Lawsuits Against Public Participation, or "SLAPPs,"<sup>1</sup> are meritless suits aimed at silencing a plaintiff's opponents, or at least at diverting their resources. To illustrate, a classic scenario pits a real estate developer against a neighborhood group opposed to a particular development. The local group distributes a negative flyer, publishes a hostile editorial in a local paper or protests to some government body. Group members might speak out at town meetings, for example, or pursue a more sophisticated strategy of reporting environmental violations to the state agency or the Environmental Protection Agency. The developer then responds with a SLAPP for defamation or interference with prospective business advantage. By definition, SLAPPs are meritless.<sup>2</sup> If the hypothetical editorial damaged the plaintiff developer's reputation by

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1. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 4 (1989).

2. See *id.* at 8.

falsely accusing the plaintiff of criminal activity and was published by the defendant local group with actual malice,<sup>3</sup> this would not be a SLAPP.

The plaintiff developer in this scenario brings the SLAPP to silence opponents and to discourage others from opposing the proposed development. In addition, the SLAPP is used to tie up an opponent's finances, time and efforts until the project is approved or public outcry subsides. Such suits are a subset of harassment, or "strike" suits, in that SLAPPs are filed not for their merits but to intimidate defendants.<sup>4</sup>

SLAPPs have an additional political dimension, however, that distinguishes them from other harassment suits. Citizen participation in self-government is at stake, implicating the constitutional right to petition the government for redress of grievances.<sup>5</sup> One objective of a SLAPP is depoliticization: the removal of the controversy from the untamed, fickle political/legislative arena to the manageable judicial arena where rights are limited and enumerated.

As apparent from these initial portrayals, SLAPPs pit two sets of fundamental constitutional rights against each other: (1) defendants' rights of free speech and petition and (2) plaintiffs' rights of access to the

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3. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 328, 349 (1974).

4. Sharlene A. McEvoy, "The Big Chill": *Business Use of the Tort of Defamation To Discourage the Exercise of First Amendment Rights*, 17 HASTINGS CONST. L.Q. 503, 505 (1990) (noting that such cases have been dubbed "nuisance suits"); Ron Galperin, *Getting SLAPPED*, L.A. TIMES, Apr. 29, 1990, at K1, K1 (quoting Penelope Canan's characterization of such suits as "'bogus lawsuits'"). But see Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417, 424 n.14 (1991) (stating that nuisance suits may not be solely to harass and are therefore different from SLAPPs).

5. U.S. CONST. amend. I; CAL. CONST. art. I, § 2; see *United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) (stating that right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights").

judicial system<sup>6</sup> and rights to non-falsely maligned reputations.<sup>7</sup> Solutions to the SLAPP problem must not compromise any of these rights. Plaintiffs must be able to bring suits with reasonable merit and defendants must be protected from entirely frivolous intimidation suits designed to chill legitimate participation in public affairs.

Part II of this Article more fully defines a SLAPP, specifically examining a plaintiff's motives for bringing such a lawsuit. Many existing defenses to SLAPPs and all the proposed solutions depend on threshold identification of a suit as a SLAPP; if it is not a SLAPP, an anti-SLAPP statute cannot be invoked.

The rest of the Article examines both partial and comprehensive solutions. Part III considers procedural measures, such as more specific pleading or acceleration of summary judgment. Part IV concentrates on substantive defenses to SLAPPs. In *Milkovich v. Lorain Journal Co.*, the Supreme Court nominally eliminated any "constitutional privilege for 'opinion'" in defamation cases,<sup>8</sup> but left collateral doctrines, such as the non-actionability of "rhetorical hyperbole," intact.<sup>9</sup> In the right to petition context, the *Noerr/Pennington* doctrine defines the perimeters of legitimate petitioning.<sup>10</sup>

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6. The Due Process Clauses protect both plaintiffs' and defendants' rights to access the courts. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982). The "right to petition the government for redress of grievances necessarily includes the right of access to the courts." *Protect Our Mountain Env't, Inc. v. District Court*, 677 P.2d 1361, 1365 (Colo. 1984) (citing *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 741 (1983); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)); *Anchorage Joint Venture v. Anchorage Condominium Ass'n*, 670 P.2d 1249, 1250-51 (Colo. Ct. App. 1983). As discussed in detail *infra* in part IV.E, the constitutional right to petition is not absolute, and the petitioning activity will not be privileged if its sole purpose is improper harassment or sham. *McDonald v. Smith*, 472 U.S. 479, 483-85 (1985) (citing *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 741 (1983); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972)); *Protect Our Mountain Env't*, 677 P.2d at 1367-69; *Webb v. Fury*, 282 S.E.2d 28, 39-40 (W. Va. 1981).

Freedom of association may also protect specific activities during litigation, such as soliciting membership and dues for an organization formed to litigate. *Great W. Cities, Inc. v. Binstein*, 476 F. Supp. 827, 834-35 (N.D. Ill.), *aff'd*, 614 F.2d 775 (7th Cir. 1979) (citing *United Transp. Union v. State Bar*, 401 U.S. 576 (1971); *United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *NAACP v. Button*, 371 U.S. 415 (1963)); *Missouri v. NOW*, 467 F. Supp. 289, 304-06 (W.D. Mo. 1979), *aff'd*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

7. See *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2707-08 (1990) (balancing "guarantee of free and uninhibited discussion of public issues" against society's "'pervasive and strong interest in preventing and redressing attacks upon reputation'" (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966))).

8. *Id.* at 2707.

9. See *id.* at 2706-07; *infra* part IV.D and accompanying text.

10. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); see *infra* part IV.E.

Part V discusses existing counteractions, or "SLAPP-backs." Abuse of process and malicious prosecution are the most prominent SLAPP-backs; although without the crucial modifications discussed, they are not necessarily the most effective way to deter SLAPPS. As a prelude to statutory solutions, part VI summarizes common-law approaches to awards of damages, costs and attorney's fees, in SLAPPS and SLAPP-backs.

Part VII surveys various state statutory approaches. Most state statutes and proposed bills have some provision for a defendant to recover costs and fees from a SLAPP. After that similarity, however, the statutes and bills diverge widely, from New Jersey's comprehensive bill protecting petitioners of government as well as defendants speaking out on public matters, to New York's narrow defamation-reform bill. California's recently enacted Lockyer bill<sup>11</sup> does not follow other designs in allowing state intervention on the side of SLAPP defendants. Nor does it require specific pleading or allow damages awards, other than litigation costs and fees, to either defendants or plaintiffs. The Lockyer bill supplements existing legal protections by providing for very early judicial screening of potential SLAPPS that implicate First Amendment rights of speech and petitioning, and by allowing fee awards to SLAPP defendants. This Article suggests that these two features are necessary but not sufficient components of California anti-SLAPP legislation. Ultimately, part VII summarizes various state statutes and bills and their shortcomings in light of the goal of actually deterring SLAPPS. Because most large SLAPP plaintiffs would not be dissuaded from pursuing their SLAPPS by the prospect of paying the defense's fees, this Article concludes that states should look further for fair and effective solutions to the SLAPP problem. Part VIII recommends several components of a comprehensive anti-SLAPP bill that would be fair to plaintiffs and defendants alike.

## II. IDENTIFYING SLAPPS

SLAPPS are by definition meritless suits.<sup>12</sup> Plaintiffs intend not to *win* but "to intimidate and harass political critics into silence."<sup>13</sup> The

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11. Act of Sept. 16, 1992, ch. 726, 1992 Cal. Legis. Serv. 3029 (West) (to be codified at CAL. CIV. PROC. CODE §§ 425.15, 425.16 and CAL. CORP. CODE §§ 5047.5, 24001.5).

12. See Pring, *supra* note 1, at 8.

13. Costantini & Nash, *supra* note 4, at 423; see also Robert H. Boyle, *Activists at Risk of Being SLAPPED*, SPORTS ILLUSTRATED, Mar. 25, 1991, at 6, 6 ("SLAPPS are lawsuits that can chill, intimidate or otherwise harass people into silence by making it prohibitively expensive for them to pursue First Amendment rights to free speech and to petition government.").

classic SLAPP depicted in the introduction<sup>14</sup> pits a small citizen group against a big developer, but these relative sizes are not universal.<sup>15</sup> Public plaintiffs in SLAPP suits are common.<sup>16</sup> Private SLAPP plaintiffs are usually private developers or landlords.<sup>17</sup>

Estimates of the magnitude of the SLAPP problem vary widely<sup>18</sup> and naturally depend in part on the definition chosen. Integral to any proposed anti-SLAPP solution is a definition of a SLAPP that is neither too broad nor too narrow. An overly broad definition would unfairly impede legitimate plaintiffs from their rightful access to the legal system, while an overly narrow definition might allow too many SLAPPs to be brought.

### A. The Public Interest Element

Perhaps the most controversial definitional element of SLAPPs is the "public interest" element. Some commentators' definitions limit SLAPPs to suits involving matters "of public interest or concern."<sup>19</sup> Similarly, the recently enacted Lockyer bill covers only suits involving First Amendment activity "in connection with a public issue."<sup>20</sup>

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14. See *supra* notes 1-3 and accompanying text.

15. Defendants can be well-financed organizations, such as the Sierra Club. See, e.g., *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972); Paula Goedert, *The SLAPP Suit Threat: Squelching Public Debate*, 22 AM. LIBR. 1003 (1991); George W. Pring, "SLAPPs": *Strategic Lawsuits Against Public Participation: A New Ethical, Tactical, and Constitutional Dilemma*, C534 ALI-ABA 937, June 25, 1990, available in WESTLAW, JLR Database.

16. Victor J. Cosentino, Comment, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W. L. REV. 399, 402 n.20 (1991) (citing Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC'Y REV. 385, 389 (1988)). Public plaintiffs have included state and local governments, *id.*, public-employee organizations, Boyle, *supra* note 13, at 9, and "schoolteachers and city council members," Galperin, *supra* note 4, at K1. Note that the recently enacted Lockyer bill exempts "any enforcement action brought [for Californians] by the Attorney General, district attorney, or city attorney, acting as a public prosecutor." Act of Sept. 16, 1992 § 2 (to be codified at CAL. CIV. PROC. CODE § 425.16(d)).

17. Cosentino, *supra* note 16, at 402; Boyle, *supra* note 13, at 6. SLAPPs are "filed in nearly equal percentages by developers, public officials and citizens." Susan Kelleher, *Speaking Out Could Lead to Liability*, L.A. DAILY NEWS, Apr. 26, 1990, at N3, available in DIA-LOG, File No. 716 (citing Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23 (1989)).

18. Philip Hager, *Tide Turns for Targets of SLAPP Lawsuits*, L.A. TIMES, May 3, 1991, at A3, A31 (noting that Penelope Canan and George W. Pring have found that 400 SLAPP suits have been filed nationwide since 1984, 14% of which originated in California); *Slapping back at SLAPP suits*, SACRAMENTO BEE, Oct. 9, 1991, at B6 (editorial). Dan Walters estimates the figure to be "more than 1000 legal actions." Dan Walters, *First Amendment Under Assault*, SACRAMENTO BEE, Apr. 8, 1991, at A3.

19. Cosentino, *supra* note 16, at 401.

20. Act of Sept. 16, 1992 § 2 (to be codified at CAL. CIV. PROC. CODE § 425.16(b)).

Aside from being vague, the public interest element creates two practical problems for SLAPP defendants. First, it creates a question of fact: whether the petitioning concerned a matter of public interest. Because a main goal of SLAPP opponents is to eliminate litigation or reduce the time of trial, adding extra issues on which to litigate could be counterproductive.<sup>21</sup>

Second, the public interest element is problematic primarily because SLAPP defendants are almost always motivated by *some* self-interest.<sup>22</sup> If this fact alone is enough to disqualify a lawsuit from SLAPP-specific solutions, a loophole is created for SLAPP plaintiffs. For example, the homeowner *H*, adjacent to a lot that the SLAPP plaintiff-developer intends to develop, opposes that project not simply because it will be bad for *H*'s neighborhood or town, but because it will also be bad for *H*'s narrower individual interests of preserving *H*'s property value, view and lack of noise and traffic. This should not preclude *H* from obtaining SLAPP-prevention remedies, or make *H*'s petitioning activity illegitimate. Solutions for SLAPPS "must focus solely on the SLAPP plaintiff's motive in suing, not the defendant's objective in petitioning."<sup>23</sup>

Vagueness of the terms "in the public interest" or "of public concern" could also, of course, work in a SLAPP defendant's favor. Following the spirit of the First Amendment right to petition,<sup>24</sup> the hypothetical homeowner *H* could argue that *H*'s activities are in the public interest even if entirely selfishly motivated.<sup>25</sup> Circumventing the definitional limit by expanding the public interest element in this way effectively eliminates this element entirely—that is, it creates a tautology. One could argue that *any* petitioning activity is per se in the public interest because it enhances the democratic process and encourages responsive

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21. Cosentino, *supra* note 16, at 400-01.

22. *Sierra Club v. Butz*, 349 F. Supp. 934, 938 (N.D. Cal. 1972); *see also Webb v. Fury*, 282 S.E.2d 28, 40 (W. Va. 1981) (stating that proof of malicious intent or even knowing falsity does not defeat right to petition).

23. Cosentino, *supra* note 16, at 401; *see also Webb*, 282 S.E.2d at 44 (Neely, J., dissenting) (discussing right to petition unless petitioning activities are mere sham).

24. U.S. CONST. amend. I; *see also Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961) ("The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so.").

25. Cosentino, *supra* note 16, at 401, interprets Pring's analysis, *supra* note 15, narrowly and perhaps unfairly. Considering Pring's list of subject areas and his inclusion of *Bell v. Mazza*, 474 N.E.2d 1111 (Mass. 1985), Pring does not intend to eliminate self-interested advocates from his definition of SLAPP defendants.



government.<sup>26</sup> In sum, if the public interest element is included in a statutory or other definition of a SLAPP, it is crucial that this element be broadly construed to allow for a SLAPP defendant's inevitable self-interest.

### B. *The Causes of Action Used*

SLAPPs are difficult to identify because they are brought as ordinary tort actions.<sup>27</sup> Thus, they are hard to quantify statistically. Also, because SLAPPs "masquerade as ordinary lawsuits," courts have a difficult time recognizing them.<sup>28</sup>

Defamation is the most popular SLAPP cause of action.<sup>29</sup> Many SLAPP claims are brought for business torts, such as interference with prospective business advantage or malicious interference with contract rights.<sup>30</sup> Conspiracy<sup>31</sup> is often added in order to "make all defendants joint tortfeasors."<sup>32</sup> In California and New York, conspiracy is not a separate substantive tort but rather a theory to connect other tortious actions into a common pattern.<sup>33</sup> SLAPPs have included an assortment of other causes of action, such as nuisance and intentional infliction of

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26. This is supported by the prime importance placed on the right to petition the government for redress of grievances. See *infra* part IV.E.1 for a discussion of the importance of this right.

27. See Goedert, *supra* note 15, at 1003; Pring, *supra* note 1, at 7 n.6; Cosentino, *supra* note 16, at 401.

28. Pring, *supra* note 1, at 9.

29. *Id.*; see also Joseph Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105, 113 (1988) (stating that libel and slander are included among usual causes of action); Cosentino, *supra* note 16, at 401 n.15 (stating that defamation is one of six most frequently observed claims); Hager, *supra* note 18, at A31 (stating that defamation, interference with business and conspiracy are typical charges). But see David Sive, *Environmental Litigation Countersuits and Delay*, C427 ALI-ABA 1319, June 26, 1989, available in WESTLAW, ALI-ABA Database (stating that malicious prosecution is most frequently invoked tort, but noting that environmental countersuits assert defamation).

30. See *Great W. Cities, Inc. v. Binstein*, 476 F. Supp. 827 (N.D. Ill.), *aff'd*, 614 F.2d 775 (7th Cir. 1979); Brecher, *supra* note 29, at 113; McEvoy, *supra* note 4, at 504; Sive, *supra* note 29, at \*2; Cosentino, *supra* note 16, at 401; Galperin, *supra* note 4, at K1; Hager, *supra* note 18, at A31.

31. Brecher, *supra* note 29, at 113; Pring, *supra* note 1, at 9; Boyle, *supra* note 13, at 6 (citing *Maple Properties v. Harris*, 470 U.S. 1074 (1985)); Hager, *supra* note 18, at A31.

32. Brecher, *supra* note 29, at 131.

33. See *SRW Assocs. v. Bellport Beach Property Owners*, 517 N.Y.S.2d 741, 744 (App. Div. 1987); Brecher, *supra* note 29, at 131 (citing *Okun v. Superior Court*, 29 Cal. 3d 442, 454, 629 P.2d 1369, 1376, 175 Cal. Rptr. 157, 164, *cert. denied*, 454 U.S. 1099 (1981)).

emotional distress.<sup>34</sup> Several of these causes of action, particularly abuse of process and malicious prosecution, are also used in SLAPP-backs.<sup>35</sup>

### C. SLAPP Plaintiffs' Motives

By definition, SLAPP plaintiffs have improper motives.<sup>36</sup> SLAPPS are consequently difficult to spot without further factual analysis, thus complicating early identification. A SLAPP plaintiff's primary motive is to chill a defendant's speech or protest activity and to discourage opposition by others.<sup>37</sup> Although most SLAPPS are unsuccessful at trial,<sup>38</sup> some succeed in chilling the defendants' activities prior to trial by forcing them to back down.<sup>39</sup> The large damage amounts sought in SLAPPS, averaging \$9.1 million,<sup>40</sup> are staggering to unsophisticated, inexperienced parties. In addition, plaintiffs often go after defendants' houses or farms, which can lower property values and discourage activity by other neighbors.<sup>41</sup> Two of Professor Canan's four listed motivations for filing

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34. Causes of action for which SLAPPS have been brought include: antitrust, *Missouri v. NOW*, 467 F. Supp. 289 (W.D. Mo. 1979), *aff'd*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980); nuisance, *Pring*, *supra* note 1, at 9; malicious prosecution, *Brecher*, *supra* note 29, at 113; Sive, *supra* note 29, at \*2; Galperin, *supra* note 4, at K1; emotional distress, *id.*; abuse of process, *Brecher*, *supra* note 29, at 113; McEvoy, *supra* note 4, at 504; *Pring*, *supra* note 1, at 9; Sive, *supra* note 29, at \*2; civil rights violations, *McEvoy*, *supra* note 4, at 504-05; constitutional rights violations, *Pring*, *supra* note 1, at 9; prima facie tort, *SRW Assocs.*, 517 N.Y.S.2d at 744; Sive, *supra* note 29, at \*2; and invasion of privacy, *Goedert*, *supra* note 15, at 1003.

35. See *infra* part V.

36. See *Pring*, *supra* note 1, at 3-9.

37. See *Webb v. Fury*, 282 S.E.2d 28, 34 (W. Va. 1981); *McEvoy*, *supra* note 4, at 505-06; *Kelleher*, *supra* note 17 (quoting Eve Pell, director of First Amendment Project at the Center for Investigative Reporting in San Francisco, who stated that "having a lawsuit filed against you is like having a monster move in with your family").

38. See *infra* notes 62-64 and accompanying text.

39. *Pring*, *supra* note 1, at 8; see also *Boyle*, *supra* note 13, at 6 (describing case of condominium developer Joseph Cioccolanti); *Galperin*, *supra* note 4, at K15 (describing Westlake North Property Association's suit against Lang Ranch and City of Thousand Oaks); Mary B. Regan, *When Water Protests Grow Loud, Lawsuits Say Shut Up*, ORLANDO SENTINEL, Aug. 18, 1991, at B1 (describing Florida case in which Save Our Neighborhood dropped suit to avoid litigation costs).

40. *Galperin*, *supra* note 4, at K1; *Hager*, *supra* note 18, at A31. SLAPP suit amounts can get much larger. See, e.g., *Boyle*, *supra* note 13, at 6 (noting \$64 million SLAPP by condominium developer Joseph Cioccolanti against defendant Jim Baker in New York); *Putting a Stop to Unfair Suits*, S.F. CHRON., Oct. 9, 1991, at A16 (editorial) (noting \$63 million SLAPP by Beverly Hills condominium developer Maple Properties against League of Women Voters' letter-writing campaign).

41. See *Hager*, *supra* note 18, at A3 ("They were going after all we had—our farms and our homes.") (quoting Jeff Thompson who was defendant in SLAPP suit brought by J.G. Boswell Company); see also *Sive*, *supra* note 29, at \*3 (noting that filing of lis pendens on defendant's house was held not to be abuse of process under California and Alaska law in *City of Angoon v. Hodel*, 836 F.2d 1245 (9th Cir. 1987)); *Galperin*, *supra* note 4, at K1 (noting that

SLAPPs concern their chilling effect: "The attempt to prevent expected future, competent opposition on subsequent public policy issues; [and] the intent to intimidate and, generally, to send a message that opposition will be punished."<sup>42</sup>

SLAPPs dissuade not only named defendants, but also their neighbors and their community.<sup>43</sup> Commentator Joseph Brecher expresses concern about "a serious diminution in the critical watchdog role played by citizens and citizens' groups."<sup>44</sup> Plaintiffs often name Doe defendants in their SLAPPs, so that anyone who steps forward after filing can conveniently be added.<sup>45</sup> Some SLAPP defendants may be worried not only about financial exposure, but also about stigma in their community.<sup>46</sup>

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defendant group protesting airport noise "can expect a tough time selling or refinancing [their houses] until the airport authority drops its claim").

42. Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 30 (1989).

43. Costantini & Nash, *supra* note 4, at 466-70; Pring, *supra* note 1, at 6; Cosentino, *supra* note 16, at 405. See also David Conn, *Bill Would Help Activists Fight Nuisance Suits*, BALTIMORE SUN, Jan. 29, 1992, at 1C, in which SLAPP defendant Ruth Ann Snyder stated: "Attendance at [Bowie, Maryland's] zoning hearings dropped to about 50 from more than 200 before the SLAPP was filed." *Id.*

44. Brecher, *supra* note 29, at 105. Brecher describes recent procedural encouragements of citizen involvement, such as relaxation of standing requirements, *id.* at 106-10; see also *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973) (standing conferred to student group suing for environmental harm based on "attenuated line of causation"); statutory allowances for citizens' groups, elimination of irreparable injury requirement for injunctions involving environmental statutory violations; easier intervention for public interest groups, Brecher, *supra* note 29, at 105-10 (describing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983)); and citizen access laws such as the Freedom of Information Act, *id.* at 110. Assembled against these advantages for citizens are the obvious systemic and financial advantages of developers and other typical SLAPP plaintiffs. Brecher expresses concern that the pendulum will be drawn back by the latter's powerful magnet. *Id.* at 110-13.

45. Boyle, *supra* note 13, at 7 (describing case of condominium developer Joseph Cioccolanti); see also *Putting a Stop to Unfair Suits*, *supra* note 40, at A16 (describing case with 500 Doe defendants).

Costantini and Nash describe how plaintiff Boswell's representative phoned non-parties who had contributed only small amounts to a fund to publish the ad at issue in the SLAPP. See Costantini & Nash, *supra* note 4, at 454-55. Fred Starr was among those called. *Id.* at 467. Costantini and Nash note that:

Fred Starr's apology and guarantee to cease supporting the [defendant] Family Farmers' efforts were sufficient to forestall [his] being served as one of the John Does in the libel complaint. He testified that merely being named a codefendant by [plaintiff] Boswell would have jeopardized his ability to secure the bank loans he needed to farm his crops . . . .

*Id.*

46. Boyle quotes SLAPP defendant Catherine Crean: "I've done nothing libelous, scandalous or anything I should be ashamed of. I'm just an ordinary citizen; I go to work every day. I worry about paying bills. I'm no Cesar Chavez. I'm just Josephine Average. By filing

SLAPP plaintiffs' primary practical motivations are delay, expense and distraction. "The typical SLAPP ties its victims up in court for an average of three years."<sup>47</sup> Although defendants may ultimately prevail, they may be unable to recoup their litigation costs or attorney's fees.<sup>48</sup> Even if defendants win back their fees, they must pay them up front or risk loss because of default.<sup>49</sup> Naturally, expenditure of significant amounts of money raises the ante for SLAPP defendants unaccustomed to such outlays.<sup>50</sup> Strategically, SLAPPS divert defendants:<sup>51</sup> During a SLAPP's pendency, the defendant's resources are tied up; a defendant organization may lose members; and while preparing for litigation, a small group or an individual will have no time to protest.

Plaintiffs' third primary motivation is depoliticization. The SLAPP moves the controversy away from the public or legislative arenas into the private judicial arena.<sup>52</sup> Arguably courts are relatively isolated from the political process.<sup>53</sup> More importantly, resolution of problems in court, except for occasional innovative equitable decrees, is a win-lose process in which only one party can win. In contrast, in a legislative setting, conflict resolution is accomplished by compromise and balancing competing interests. Conflicts crucial to community development may be best resolved in a legislative setting.<sup>54</sup> As far as impact, in the political arena a small or poorly funded group can conceivably stir up significant

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SLAPP suits, people with the wherewithal can stifle small groups.' " Boyle, *supra* note 13, at 9.

47. Cosentino, *supra* note 16, at 404 n.36 (quoting Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 26 (1989)); see also Galperin, *supra* note 4, at K1, K15 ("[T]he average SLAPP asks for \$9 million in damages and lasts about three years before getting resolved."); Mark Goldowitz, *SLAPP Lawsuits and the First Amendment*, SACRAMENTO BEE, Dec. 23, 1991, at B13; *Slapping back at SLAPP suits*, *supra* note 18, at B6 ("[I]t takes an average of three years and thousands of dollars in legal fees to settle those meritless cases."); cf. Costantini & Nash, *supra* note 4, at 426-28 (noting that *Boswell* SLAPP defendants ultimately won \$13 million for libel, but it took eight years, including appeals).

48. Under the American rule, parties must each pay their own costs and fees unless a common-law or statutory exception exists. See, e.g., CAL. CIV. PROC. CODE §§ 1021-1021.9 (West 1980 & Supp. 1992); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263-69 (1975). Part VI *infra* will discuss such California common-law exceptions as the *Serrano v. Priest*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977), private-attorney-general theory and the *Brandt v. Superior Court*, 37 Cal. 3d 813, 693 P.2d 796, 210 Cal. Rptr. 211 (1985), tort damages theory. Part VII *infra* will discuss existing and proposed statutory theories of recovery.

49. McEvoy, *supra* note 4, at 525; *Slapping back at SLAPP suits*, *supra* note 18.

50. Brecher, *supra* note 29, at 114; Cosentino, *supra* note 16, at 404.

51. Cosentino, *supra* note 16, at 403.

52. Canan, *supra* note 42, at 23-24; McEvoy, *supra* note 4, at 506; Pring, *supra* note 15, at \*937; Cosentino, *supra* note 16, at 403.

53. Cosentino, *supra* note 16, at 403.

54. See *id.* at 428.

grass-roots interest, but a court outcome is more dependent on the parties' financial backing and skill. Traditionally, courts eschew the political aspects of controversies and political lines of analysis.<sup>55</sup> Legal issues are often arcane to the lay public. A judicial setting also "transforms the focus of the dispute,"<sup>56</sup> by switching attention from the plaintiff's actions, in the press or local political body, to the defendant's actions, in court. Similarly, SLAPP litigation "transform[s] the dispute topics (for example, zoning becomes libel) and move[s] the forum."<sup>57</sup>

Professor Pring notes that as the third step in a cyclical process, SLAPP defendants can re-politicize the dispute by using a Petition Clause defense<sup>58</sup> and by bringing their cause to the press or to the government. Allowing government intervention in a SLAPP would accomplish half of this third step by involving a public body, even though the dispute is still in a judicial forum.<sup>59</sup> Finally, another motivation identified by Professor Canan is to use SLAPPs "as simply another tool in a strategy to win a political and/or economic battle."<sup>60</sup>

SLAPP plaintiffs may have other motives.<sup>61</sup> Most crucially, SLAPP plaintiffs do not intend to *win* the litigation. "[P]revailing in the courts is not the goal of the plaintiffs. Rather, they seek to silence their critics by forcing them to spend thousands of dollars to defend themselves."<sup>62</sup> In fact, defendants win eighty to ninety percent of all SLAPP suits litigated on the merits.<sup>63</sup> Specifically because winning is not a SLAPP plaintiff's prime motivation, existing safeguards are inadequate. They focus on preventing plaintiffs from winning meritless suits. SLAPP plaintiffs,

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55. Cf. *Baker v. Carr*, 369 U.S. 186, 209 (1962) (holding that challenge to Tennessee apportionment statutes does not present nonjusticiable "political question"); see *infra* note 370 and accompanying text.

56. Cosentino, *supra* note 16, at 403.

57. Pring, *supra* note 15, at \*24.

58. *Id.*; see *infra* part IV.E.

59. Government intervention is discussed *infra* in part III.E.

60. Canan, *supra* note 42, at 30.

61. For example, Professor Canan lists retaliation as another motive. *Id.* Certainly, SLAPPs can have devastating effects on their defendants. For example, SLAPP defendant Barbara Dolan and her husband "were faced with financial ruin. It took two years to fight this case, two years of personal agony . . . . My mother was already in fragile health, and it's my belief the stress of the experience hastened her death. So even if the other side loses, there's been cost to you." Thomas Clavin, *The High Price of High Ideals*, WOMAN'S DAY, Sept. 24, 1991, at 51 (quoting Barbara Dolan).

62. Walters, *supra* note 18, at A3; see McEvoy, *supra* note 4, at 505-06; Cosentino, *supra* note 16, at 403.

63. Pring, *supra* note 15, at \*23; Clavin, *supra* note 61, at 50; *Slapping back at SLAPP suits*, *supra* note 18; see also Brecher, *supra* note 29, at 113-14 (stating that no SLAPP plaintiff has won SLAPP suit); Hager, *supra* note 18, at A31 (stating that 80% of SLAPPs are either dropped or won by defendant).

however, expect to lose their suits, and often concede the litigation costs, such as the defendants' attorney's fees, as costs of doing business.<sup>64</sup> Thus, a Petition Clause defense or the specter of a malicious prosecution SLAPP-back will not necessarily deter the original SLAPP, which by that time may have accomplished the delay or diversion necessary for the plaintiff's project to be approved or even completed.

### III. PROCEDURAL REMEDIES FOR SLAPPS

Legislators, commentators and courts have proposed an assortment of procedural antidotes to SLAPPS. Some proposals, such as court-ordered discovery costs and specific pleading, are minor and clearly supplemental to larger remedies.<sup>65</sup> Others, such as significantly accelerating initial court review on the merits, would serve as more formidable deterrents to filing SLAPPS. Any of these procedural fixes could be accomplished either by statute or by the rules of the court. Many are included in existing or proposed legislation, as discussed below.

#### A. Specific Pleading

Judge Neely's dissent in *Webb v. Fury*<sup>66</sup> suggested a mandate that pleadings be more specific if First Amendment rights are involved.<sup>67</sup> The current default in notice-pleading jurisdictions is to require "a short and plain statement of the claim showing that the pleader is entitled to relief,"<sup>68</sup> but disfavored actions such as fraud require specific pleading.<sup>69</sup> Greater pleading detail will facilitate the initial judicial triage that is essential to dismiss SLAPPS early. Its value would arise in conjunction

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64. See Galperin, *supra* note 4, at K15 (stating that developers who file suits do not expect to win).

65. Commentators Costantini and Nash include removal as a possible alternative strategy to a direct SLAPP-back, for SLAPP defendants to quickly terminate litigation. Costantini & Nash, *supra* note 4, at 477 n.230. The strategic value of removal would of course depend on the jurisdiction and the political biases of the respective state and federal courts therein. Conceivably, it could help *either* side. In addition, California and federal courts may have different standards for the petitioning privilege. See *infra* notes 206-08 and accompanying text. Obviously, removal would not eliminate the suit, its chilling power, or its cost and delay.

66. 282 S.E.2d 28 (W. Va. 1981).

67. *Id.* at 47 (Neely, J., dissenting). "[T]he danger that the mere pendency of the action will chill the exercise of first amendment rights requires more specific allegations than would otherwise be required." . . . If necessary, the Court should invoke its rule-making authority and amend the Rules [of Civil Procedure] to so provide." *Id.* (Neely, J., dissenting) (quoting *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1083 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977)); see also Cosentino, *supra* note 16, at 423-24 (discussing Judge Neely's dissent in *Webb*).

68. *E.g.*, FED. R. CIV. P. 8(a)(2).

69. *E.g.*, FED. R. CIV. P. 9(b).

with other procedural remedies outlined below, such as the acceleration of a heightened dismissal standard.

### B. *Discovery Costs*

Discovery is usually the most expensive, time-consuming and intimidating litigation stage before adjudication on the merits. In addition to the harassment of the SLAPP itself, the liberal discovery allowed by the Federal Rules of Civil Procedure provides opportunities for further harassment.<sup>70</sup> Judge Neely's dissent in *Webb* recommended that courts be allowed to order a plaintiff to pay for all of a defendant's discovery costs up front "in appropriate circumstances of gross imbalance of assets"; then, if the plaintiff wins at trial, the defendant would reimburse the plaintiff for those advance discovery costs.<sup>71</sup> Mandatory payment of a defendant's discovery costs, like specific pleading, is a supplemental remedy, effective only in conjunction with more potent SLAPP-detering measures.

California's recently enacted Lockyer bill provides SLAPP defendants with "a special motion to strike" that defendants can exercise within sixty days of filing a SLAPP.<sup>72</sup> "All discovery proceedings in the action shall be stayed" as soon as such a motion is filed and until the court renders its decision on this motion.<sup>73</sup> This provision effectively removes much of the intimidation associated with voluminous discovery requests by SLAPP plaintiffs.

### C. *Acceleration of Preemptive Judicial Review*

Quick and early resolution of litigation is the single most important component of any court or statutory scheme to prevent SLAPPs. Expediting the SLAPP process will not only alleviate its chilling effect on defendants, but it will also create disincentives for plaintiffs seeking primarily to delay and distract their opponents. The earlier that threshold judicial review occurs, the less effective the SLAPP will be. The Colorado Supreme Court, in *Protect Our Mountain Environment, Inc. v. District Court*, essentially moved summary judgment review back to the dismissal stage of the litigation.<sup>74</sup>

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70. See FED. R. CIV. P. 26(b)(1); Cosentino, *supra* note 16, at 408 n.54.

71. *Webb*, 282 S.E.2d at 47 (Neely, J., dissenting).

72. Act of Sept. 16, 1992.

73. *Id.* § 2 (to be codified at CAL. CIV. PROC. CODE § 425.16(g)).

74. 677 P.2d 1361, 1370 (Colo. 1984). Professor Canan asserts that "the average SLAPP suit lasts 36 months, but the motion [to dismiss based on constitutional protection] reduces the time to 4 months." Clavin, *supra* note 61, at 50.

California's recently enacted Lockyer bill establishes even earlier judicial review.<sup>75</sup> A complaint involving First Amendment rights and a "public issue"<sup>76</sup> cannot be filed—or if filed, is subject to an immediate motion to strike—before the court has tested its validity, using affidavits from both sides to ascertain whether the plaintiff has "a probability" of prevailing on the merits.<sup>77</sup> The provision for input from both sides contributes to the fairness of this proposed remedy. Its immediacy would serve as a strong deterrent to SLAPPs because early dismissal before the defendant has spent much time and money would significantly neutralize a SLAPP's effectiveness. Of course the efficacy of such an accelerated dismissal is contingent upon the dismissal standard used—in this case, on exactly what "a probability" means.

#### D. Dismissal Standards

##### 1. Threshold standards

Courts usually do not dismiss SLAPPs at the demurrer stage of litigation because the claims generally present *some* cognizable claim.<sup>78</sup> Under the Federal Rules of Civil Procedure, a plaintiff's claim may be dismissed at this point only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>79</sup>

Despite this formidable standard, some courts have dismissed SLAPPs under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted."<sup>80</sup> In *Sierra Club v.*

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75. Act of Sept. 16, 1992.

76. See *supra* part II.A for a discussion of the advantages and disadvantages of the public interest component.

77. Act of Sept. 16, 1992 § 2 (to be codified at CAL. CIV. PROC. CODE § 425.16(b)).

78. Cosentino, *supra* note 16, at 414; see also FED. R. CIV. P. 12(b)(6) (allowing motion to dismiss for "failure to state a claim upon which relief can be granted").

79. *Miller & Son Paving, Inc. v. Wrightstown Township Civic Ass'n*, 443 F. Supp. 1268, 1273 (E.D. Pa. 1978) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)), *aff'd mem.*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979); accord *Sierra Club v. Butz*, 349 F. Supp. 934, 936 (N.D. Cal. 1972); see FED. R. CIV. P. 12(b)(6). Massachusetts follows the federal standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *Bell v. Mazza*, 474 N.E.2d 1111, 1115 (Mass. 1985). Similarly, in New York a defendant must show "conclusively that [the] plaintiff has no cause of action." . . . [And] that, in light of the evidence presented, 'no significant dispute exists.'" *SRW Assocs. v. Bellport Beach Property Owners*, 517 N.Y.S.2d 741, 743 (App. Div. 1987) (first alteration in original) (citations omitted). Colorado courts will dismiss "if recovery would be constitutionally prohibited, and . . . such infirmity appears on the face of the complaint." *Anchorage Joint Venture v. Anchorage Condominium Ass'n*, 670 P.2d 1249, 1251 (Colo. Ct. App. 1983).

80. FED. R. CIV. P. 12(b)(6).



*Butz*,<sup>81</sup> the defendant timber company alleged in its counterclaim that the plaintiff environmental group "willfully" caused the government to reject the defendant's timber sales. The federal district court dismissed this counterclaim on three grounds: (1) The willfulness of the plaintiff's petitioning activity by itself could not remove constitutional protection; (2) the plaintiff's petitioning would have had to have been entirely for an improper purpose under the *Noerr/Pennington* sham exception doctrine, and this plaintiff had simply petitioned through the proper channels; and (3) the plaintiff could not be held liable for the *government's* action even if the plaintiff helped persuade the government to act.<sup>82</sup>

In *Miller & Son Paving, Inc. v. Wrightstown Township Civic Ass'n*,<sup>83</sup> the court dismissed the plaintiff's Sherman Act claim because the case involved a political zoning fight, rather than the requisite commercial dispute.<sup>84</sup> The court also dismissed a civil rights claim under 42 U.S.C. § 1983 because the plaintiff had not adequately specified what due process rights, if any, had been denied.<sup>85</sup> In addition, the court dismissed the plaintiff's claims under 42 U.S.C. §§ 1985(3) and 1986 because, *inter alia*, the court found no class-based discrimination.<sup>86</sup>

In *SRW Associates v. Bellport Beach Property Owners*,<sup>87</sup> a New York court summarily dismissed a SLAPP for failure to state a claim. The court rejected an injurious falsehood claim, finding no causation as a matter of law; no *prima facie* tort claim because the defendant's intent was not solely malicious; and no conspiracy claim because conspiracy was not a valid separate cause of action.<sup>88</sup>

As the Lockyer bill's probability standard is as yet untested, one can only speculate what it will mean in practice. One commentator analogized it to a threshold test used in medical malpractice for punitive dam-

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81. 349 F. Supp. 934 (N.D. Cal. 1972). In this case the plaintiff and defendant are reversed so that the SLAPP is the defendant's counterclaim.

82. *Id.* at 939. See *infra* part IV.E for a discussion of the *Noerr/Pennington* sham doctrine.

83. 443 F. Supp. 1268 (E.D. Pa. 1978), *aff'd mem.*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979).

84. *Id.* at 1272-73.

85. *Id.* at 1272.

86. *Id.* at 1273.

87. 517 N.Y.S.2d 741 (App. Div. 1987).

88. *Id.* at 743-44. See *supra* text accompanying notes 31-33 for a discussion of conspiracy claims.

ages.<sup>89</sup> The frivolous lawsuit sanction rules, Federal Rule 11<sup>90</sup> and California Code of Civil Procedure section 128.5,<sup>91</sup> do not provide helpful analogies for the probability standard, because these rules are usually charitably applied.<sup>92</sup> The criminal law's probable cause standard<sup>93</sup> or the civil standard for summary judgment, a "genuine issue as to any material fact,"<sup>94</sup> might be more helpful.

The Lockyer bill's original language included a "substantial probability" standard. This language was the prime stumbling block for opponents of the anti-SLAPP statute such as the California Building Industry Association (CBIA).<sup>95</sup> CBIA viewed a substantial probability as a *preponderance*<sup>96</sup> presumably because "probable" literally means more likely than not. Requiring a plaintiff to meet a preponderance burden before discovery would no doubt impair the plaintiff's rights to due pro-

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89. Goldowitz, *supra* note 47, at B13. Commenting on the "substantial probability" standard originally proposed in the Lockyer bill, Goldowitz stated:

[T]he same test must now be passed in order to pursue punitive damages against doctors, and an even more stringent test exists for punitive damage claims against religious organizations. It makes sense to provide similar extra protections for citizens willing to participate in our political process, particularly in these days of dwindling public participation.

*Id.*; see also CAL. CIV. PROC. CODE §§ 425.13(a) (West Supp. 1992) ("substantial probability" hurdle for medical malpractice punitive damages), 425.14 (West Supp. 1992) ("evidence which substantiates" test for punitive damages against religious organizations); CAL. CIV. CODE § 1714.10(a) (West Supp. 1992) ("reasonable probability" screen for damages for certain lawyer-client conspiracies).

90. FED. R. CIV. P. 11.

91. CAL. CIV. PROC. CODE § 128.5 (West 1982 & Supp. 1992).

92. See, e.g., *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1538-42 (9th Cir. 1986) (rejecting broad application of Rule 11); Brecher, *supra* note 29, at 136 (noting that California Supreme Court strictly construes sanction power). See *infra* part IV.B for a discussion of frivolous lawsuit rules.

93. To prove probable cause to search or arrest, police authorities must show a magistrate trustworthy facts which would lead a reasonable person to believe that the search or arrest is necessary. See *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983) (holding that anonymous letter whose facts police subsequently corroborated was sufficient to find probable cause). Significantly, only a probability is required, not a *prima facie* showing of a crime. *Id.* at 235. Although the probable cause requirement has been significantly weakened by many exceptions, see, e.g., *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the principle may still elucidate the substantial probability standard, especially as both phrases share the elusive "probable" variable. The *Gates* case illustrates just how low the probable cause threshold is: A pivotal fact on which the court relied to find that the police had probable cause was that the suspect was going to Florida, a major drug-smuggling center. *Gates*, 462 U.S. at 243.

94. E.g., FED. R. CIV. P. 56(c).

95. Telephone Interview with Richard J. Lyons, Lobbyist, CBIA (May 2, 1992).

96. *Id.*

cess.<sup>97</sup> Judging from the heavily litigated concept of probable cause, however, substantial probability was not intended to mandate a preponderance burden at such an early stage.

An earlier version of this Article, submitted to the State Legislature, suggested a "substantial possibility" standard, which would placate business interests yet still provide an effective barrier to SLAPPs. The Governor's Office of Planning and Research proposed a third wording for the standard of threshold review: A court could look for "evidence to substantiate the claim."<sup>98</sup> As discussed, a SLAPP is couched as an ordinary tort claim, and invariably *some* evidence supports such a claim. For example, the courts would find some evidence to support a claim where a defendant did make a derogatory statement about a plaintiff, even if the statement was clearly "rhetorical hyperbole."<sup>99</sup> The mere-evidence test would therefore be too porous. In contrast, the "substantial possibility" standard presents a workable compromise. It retains substantiality as a minimal screen, but does not demand probability of success, just possibility.

The language of the recently enacted Lockyer bill arrives at a different compromise standard. The word "substantial" has been deleted, but the word "probability" remains.<sup>100</sup> Although retention of the word "probability" seems to carry with it the same problematic connotation of preponderance, this middle ground was apparently acceptable to business groups and to Governor Wilson, who approved the bill with the probability standard on September 16, 1992.<sup>101</sup>

## 2. Factual review standards

For initial review of SLAPPs to be effective, courts should also use the summary judgment standard for factual deference, rather than the Rule 12(b)(6) standard. At the dismissal stage, courts accept all allegations of the complaint as true.<sup>102</sup> At summary judgment, however, courts view facts and inferences in the light most favorable to the non-moving party.<sup>103</sup> Court review of suits initially believed to be SLAPPs

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97. See *supra* note 6 for a discussion of the constitutional right of access to the judicial system. Constitutionally, the preponderance burden should not come into play until trial.

98. Letter from Richard Sybert, Director, Governor's Office of Planning and Research, to Senator Bill Lockyer (April 28, 1992) (on file with author).

99. See *infra* text accompanying notes 167-81 for a discussion of rhetorical hyperbole.

100. Act of Sept. 16, 1992 § 2 (to be codified at CAL. CIV. PROC. CODE § 425.16(b)).

101. See Act of Sept. 16, 1992.

102. *E.g.*, *United States v. Gaubert*, 111 S. Ct. 1267, 1276 (1991).

103. *E.g.*, *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072, 2076-77 (1991).

will necessarily entail some close factual analysis, as SLAPP claims are almost always *legally* coherent.

California courts prefer to decide First Amendment-related cases at summary judgment: "[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable. Therefore, summary judgment is a favored remedy . . . ." <sup>104</sup> This has been particularly true with cases involving the opinion privilege. <sup>105</sup>

### E. Government Intervention in the SLAPP

Proposed anti-SLAPP bills in New Jersey and Maryland, and a recent state statute in Washington, all provide for government intervention on behalf of SLAPP defendants. <sup>106</sup> The government body must be one to which the SLAPP defendant initially petitioned. <sup>107</sup> If the government body originally involved—prior to the SLAPP—does not choose to intervene, then and only then, may the attorney general intervene on the defendant's side. <sup>108</sup> The subject matter of the original communication to the agency must have been something "reasonably of concern" to that agency. <sup>109</sup>

Although only allowing government intervention on a defendant's side may seem inequitable, and may even raise potential equal protection issues, the Washington statute and the Maryland bill offset this effect by allowing a SLAPP *plaintiff* to recover fees if the defense is unsuccessful. <sup>110</sup> Washington's more complex fee structure actually provides an ad-

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104. *Good Gov't Group, Inc. v. Superior Court*, 22 Cal. 3d 672, 685, 586 P.2d 572, 578, 150 Cal. Rptr. 258, 264 (1978) (citation omitted), *cert. denied*, 441 U.S. 961 (1979).

105. *See, e.g., Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783 (9th Cir. 1980); *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 260, 268-69, 721 P.2d 87, 90, 96, 228 Cal. Rptr. 206, 209, 215 (1986), *cert. denied*, 479 U.S. 1032 (1987); *Okun v. Superior Court*, 29 Cal. 3d 442, 450, 459, 629 P.2d 1369, 1374, 1379, 175 Cal. Rptr. 157, 162, 167, *cert. denied*, 454 U.S. 1099 (1981). However, if the language at issue is clearly ambiguous and could be either fact or opinion, a jury should make the determination. *Good Gov't Group*, 22 Cal. 3d at 682, 586 P.2d at 576, 150 Cal. Rptr. at 262.

106. WASH. REV. CODE ANN. § 4.24.520 (West Supp. 1992); S. 51, 398th Leg., Reg. Sess. (Md. 1992); A. 190, 205th Leg., 1st Sess. (N.J. 1992). *See Conn, supra* note 43, for a discussion of the Maryland bill. Government in this context means any federal, state or local government body or agency. The New Jersey bill also covers "any other political subdivision or public body in the State." A. 190, *supra*.

107. *Id.*; WASH. REV. CODE ANN. § 4.24.520. The government body or agency must have "receiv[ed] a complaint or information under [§] 4.24.510 . . . ." *Id.*

108. WASH. REV. CODE ANN. § 4.24.520; S. 51, *supra* note 106; A. 190, *supra* note 106.

109. WASH. REV. CODE ANN. § 4.24.510; S. 51, *supra* note 106; A. 190, *supra* note 106.

110. WASH. REV. CODE ANN. § 4.24.520; S. 51, *supra* note 106.

ditional disincentive for agency intervention, by allowing a plaintiff to recover fees and costs from the agency if the agency's defense fails.<sup>111</sup>

Allowing government intervention on behalf of SLAPP defendants could significantly reduce both the chilling effect and the prohibitive expense to these defendants. In addition, because of the government involvement, the dispute would not be entirely depoliticized, even though the dispute was moved to a judicial forum. Government involvement in general—not necessarily government intervention into the litigation as a party—may also assist SLAPP defendants by interrupting the chain of but-for causation.<sup>112</sup> On the other hand, SLAPP plaintiffs' aims of delay and distraction would be largely unaffected by government intervention, so this antidote is also supplemental. In other words, having the government on their side may reduce both the chill and the expense of defending a SLAPP, but the SLAPP will still subject its defendants to delay and distraction.

#### IV. SUBSTANTIVE REMEDIES: DEFENSES

##### A. *Precautions Before a SLAPP Is Brought*

Though easier said than done, the best defense to the chill of a SLAPP is to be informed rather than intimidated. A SLAPP defendant's perseverance may well be rewarded, in that the eventual payoffs for a malicious prosecution SLAPP-back can be substantial.<sup>113</sup> In addition, political involvement at a local level can ensure that local planning bodies are more responsive to citizens' interests.<sup>114</sup>

More specific precautionary measures include avoiding defamation, incorporating and obtaining insurance. Potential SLAPP defendants speaking out or expressing themselves in writing against a powerful de-

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111. WASH. REV. CODE ANN. § 4.24.520.

112. *E.g.*, *SRW Assocs. v. Bellport Beach Property Owners*, 517 N.Y.S.2d 741, 743-44 (App. Div. 1987). In *SRW Associates*, the court found that the defendant's allegedly false statements to the public did not directly cause the town board's denial of the plaintiff developer's building application. *Id.* Because the board knew independently that the plaintiff applied to build single-family residences even though the defendant mischaracterized the proposed buildings as "clustered," there could be no but-for causation for the plaintiff's injurious falsehood claim against the defendant. *Id.*; see also *Sierra Club v. Butz*, 349 F. Supp. 934, 939 (N.D. Cal. 1972) ("[L]iability can never be imposed upon a party for damage caused by governmental action he induced." (emphasis added)).

113. For example, three farmers eventually won a multi-million dollar judgment against an agribusiness giant, J.G. Boswell Corporation. *Costantini & Nash*, *supra* note 4, at 426; Boyle, *supra* note 13, at 11; *Slapping back at SLAPP suits*, *supra* note 18. By the time of this judgment, however, these farmers and many of their neighbors had long since withdrawn from any further political activism. See *Costantini & Nash*, *supra* note 4, at 468-70.

114. See *McEvoy*, *supra* note 4, at 531.

veloper or other public figure,<sup>115</sup> would be well advised to avoid *ad hominem* attacks and follow one columnist's advice: "Don't get personal in your accusations . . . [A]void insults or inflammatory charges."<sup>116</sup> This admonishment carries some chill, but could also encourage more rigorous preliminary factual investigation by citizen activist groups. Citizens' groups also can incorporate in order to keep SLAPP plaintiffs from threatening their homes and personal savings.<sup>117</sup> Once incorporated, a group can procure corporate liability insurance. Insurance coverage is an obvious, although not always reliable, protection for SLAPP defendants. Some homeowners' insurance policies cover legal costs.<sup>118</sup> SLAPP defendants have discovered, however, that insurance coverage may decrease or disappear once a SLAPP is filed.<sup>119</sup>

Insurance reform would be another statutory approach to protecting SLAPP defendants.<sup>120</sup> The state could either establish an insurance supplement fund for SLAPP defendants, or require that insurance carriers offer coverage or that carriers not reduce existing coverage.<sup>121</sup> A state

115. An otherwise private individual who voluntarily inserts himself or herself into the community on one particular project or matter can be considered a "public figure" as to that project for purposes of defamation. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974); *Walters v. Linhof*, 559 F. Supp. 1231, 1235 (D. Colo. 1983); *Okun v. Superior Court*, 29 Cal. 3d 442, 451, 629 P.2d 1369, 1374, 175 Cal. Rptr. 157, 162, *cert. denied*, 454 U.S. 1099 (1981). For a discussion of the significance of public figure status, see *infra* notes 191-94 and accompanying text.

116. McEvoy, *supra* note 4, at 531; Clavin, *supra* note 61, at 50.

117. Sive, *supra* note 29, at \*2; Galperin, *supra* note 4, at K15. Professor Sive notes that a corporate veil can be pierced if incorporation is fraudulent or accomplished solely to avoid operation of law. Sive, *supra* note 29, at \*1 n.3.

118. Clavin, *supra* note 61, at 50.

119. *E.g.*, *Wegis v. J.G. Boswell Co.*, No. FO11230, slip op. at 10-11 (Cal. Ct. App. June 14, 1991). In *J.G. Boswell*, once the SLAPP was filed, the defendant farmers lost some insurance coverage and were forced to obtain insurance from another company at greater cost. *Id.*; *Costantini & Nash*, *supra* note 4, at 465. "Indeed, [defendant's] new insurance company advised him to avoid involvement in political campaigns if he wished to reduce the deductible he had been required to take for personal damage insurance following the libel suit." *Id.* at 468; see also *Regan*, *supra* note 39, at B1 (quoting researcher's findings that SLAPPs led to cancellation of insurance).

120. This Article discusses only broad options in the insurance reform area; further examination is beyond its scope.

121. Such a requirement may interfere with carriers' freedom to contract by telling them with whom to do business. See U.S. CONST. art. I, § 10, cl. 1. Making a regulation, however, that applies only *prospectively* could circumvent Contracts Clause challenges. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.8, at 405 (4th ed. 1991). In addition, the analysis in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242-44 (1978), indicates that the Supreme Court would probably find that the Constitution permits such regulation of insurance coverage despite the regulation's impairment of existing insurance contracts, because the speech rights involved in SLAPPs are a "basic societal interest." See *id.* at 242. Insurance carriers could argue that they detrimentally relied on the absence of such

insurance fund could be financed by collecting mandatory contributions from unsuccessful defamation plaintiffs or SLAPP plaintiffs.<sup>122</sup> Such insurance reform proposals would require a narrow threshold test to identify that insureds were indeed victims of SLAPPs. For example, the statute could require an initial showing that free speech or the right to petition was involved, or a showing that the defendant could not get adequate coverage otherwise.

### B. *F frivolous Lawsuit Remedies and Ethical Duties*

The existing provisions in professional ethical codes and sanction provisions in Federal Rule of Civil Procedure 11 and California Code of Civil Procedure section 128.5, do not adequately deter SLAPPs. These provisions provide standards and enforcement proceedings that are lax and are not SLAPP-specific.

#### 1. Duties under professional ethical codes

Under both the California Rules of Professional Conduct and the two American Bar Association codes, a lawyer cannot file a suit *solely or merely* to harass or to delay.<sup>123</sup> Thus, the lawyer must have probable cause to bring the suit, and the suit must have some substantial purpose other than harassment or delay. If the suit is short on law, the lawyer's ethical duties are satisfied if the attorney has a good-faith argument for the extension, modification or reversal of existing law.<sup>124</sup> Under the ABA Model Code and Model Rules, the lawyer need not subjectively believe that the argument will ultimately prevail, but must believe that the argument is made in good faith.<sup>125</sup> Under the California Rules and the Model Code, the merely-to-harass standard is applicable only if the lawyer knows or should know that the suit is meritless.<sup>126</sup> Duties under

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mandates, in setting loss-reserve amounts, but the industry is so heavily regulated that this reliance would be arguably misplaced. *See id.* at 250.

122. It appears that this particular proposal comes closer than many anti-SLAPP remedies to directly penalizing plaintiffs for using the legal system to bring meritless suits.

123. CALIFORNIA RULES OF PROFESSIONAL CONDUCT § 3-200(A) (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1990).

124. CALIFORNIA RULES OF PROFESSIONAL CONDUCT § 3-200(B); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1.

125. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4; MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. The California Rules do not address this issue.

126. CALIFORNIA RULES OF PROFESSIONAL CONDUCT § 3-200(A); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1); *cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (omitting requirement of lawyer's knowledge).

the ethical codes are unlikely to effectively prevent SLAPPs, because citizen defendants are usually unaware of professional disciplinary options, because the bar and the bench are reluctant to report their colleagues' misdeeds,<sup>127</sup> and because SLAPPs are couched as legitimate torts and are not easy to recognize as meritless.

## 2. Federal Rule of Civil Procedure 11

Federal Rule of Civil Procedure 11 will not in practice or in principle prevent plaintiffs from filing SLAPPs for some of the same reasons that the ethical codes will not, such as lax standards and enforcement. Under Rule 11, a court can sanction a lawyer, client or both for bringing a lawsuit for "any improper purpose," or for filing a lawsuit whose facts as pleaded have not been reasonably investigated or are not based on "existing law or a good faith argument for the extension, modification, or reversal of existing law."<sup>128</sup> If, using an objective standard, either the improper purpose or the good-faith basis in law or fact prongs are violated, then sanctions are mandatory.<sup>129</sup> The nature and severity of the sanctions are up to the court,<sup>130</sup> but in practice they are hardly sufficient to deter SLAPPs.<sup>131</sup>

Superficially, SLAPPs will always appear to be well-grounded in fact and law. SLAPPs will have no trouble passing the factual-basis aspect of a Rule 11 analysis because SLAPPs, although improper, invariably rest on some demonstrable facts or alleged statement by the defend-

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127. The California Business and Professions Code has no general policing rule. The American Bar Association codes both require lawyers to report their colleagues' ethical violations to the appropriate professional authorities, unless their knowledge of those violations is privileged. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) & (c). Predictably, reporting under these two latter national provisions is infrequent. Cosentino, *supra* note 16, at 419. Cosentino recommends that SLAPP-reform schemes expressly require judges to report attorneys who bring SLAPPs to state disciplinary bodies. *Id.* at 427.

128. FED. R. CIV. P. 11. The lawyer filing the lawsuit must sign any "pleading, motion or other paper." This signature certifies

that to the best of his knowledge, information, and belief formed after reasonable inquiry [the lawsuit] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

*Id.*

129. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir. 1986). Sanctions may be imposed either on a party's motion or on the court's own motion even after the case has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398 (1990).

130. *Kapco Mfg. Co. v. C & O Enters.*, 886 F.2d 1485, 1496 (7th Cir. 1989).

131. For example, the sanction at issue in the *Golden Eagle Distributing* cases against a large Chicago-based law firm was in the amount of \$3,155.50. *Golden Eagle Distrib.*, 801 F.2d at 1534.



ants. The "not well-grounded in fact" standard will only prevent a lawsuit without factual support, such as an antitrust action against a non-competitor<sup>132</sup> or an action in which the lawyers have been especially careless in reviewing the factual basis of the claim.<sup>133</sup>

Courts also can impose sanctions if a claim has neither a legal basis nor a reasonable argument for a change in the law.<sup>134</sup> As the *Golden Eagle Distributing Corp. v. Burroughs Corp.* litigation demonstrates, courts apply this aspect of Rule 11 very leniently.<sup>135</sup> In the predecessor action,<sup>136</sup> the sanctioned law firm cited a 1965 California Supreme Court case to support the unavailability of tort damages for economic loss under California law,<sup>137</sup> but failed to cite the landmark 1979 California Supreme Court case that allowed such damages if foreseeable.<sup>138</sup> The trial court sanctioned the law firm for violating its "duty to disclose adverse authority."<sup>139</sup> The Ninth Circuit reversed, contending that a lawyer's role is to advocate, not "to find all potentially contrary authority."<sup>140</sup> Thus, the standard applied by the Ninth Circuit will not

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132. See *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985).

133. *E.g.*, *Cooter & Gell*, 496 U.S. at 388-90 (sanctioning lawyers for insufficient prefling investigation of claim for "nationwide conspiracy to fix prices" where lawyers merely telephoned several men's stores in only four East Coast cities and inferred price fixing). In addition to determining that a pleading is well-grounded in fact and law, a court should "consider all the circumstances," such as time pressures on the lawyer. *Id.* at 401.

134. *Id.* at 392; *Golden Eagle Distrib.*, 801 F.2d at 1534-39. Professor Sive observes that Rule 11's language regarding "the extension, modification, or reversal of existing law" especially fits a developing area such as environmental law. Sive, *supra* note 29, at \*5.

135. 809 F.2d 584, 586-89 (9th Cir. 1987) (Noonan, J., dissenting from denial of sua sponte request for en banc hearing).

136. *Golden Eagle Distrib.*, 801 F.2d 1531 (9th Cir. 1986).

137. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

138. *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979).

139. *Golden Eagle Distrib.*, 801 F.2d at 1535; see also *Golden Eagle Distrib.*, 809 F.2d at 586 (Noonan, J., dissenting from denial of sua sponte request for en banc hearing) ("How can a brief be warranted by existing law if its argument goes in the face of 'directly contrary' authority from the highest court of the jurisdiction whose law is being argued?").

140. *Golden Eagle Distrib.*, 801 F.2d at 1542. The Ninth Circuit also reversed the trial court's Rule 11 sanction for the law firm's misleading characterization of a United States Supreme Court exception. *Id.* at 1534-35, 1541. It found the district court's "argument identification" requirement made too fine a distinction between whether an argument is based on existing law or is an argument for an extension or modification of existing law. *Id.* at 1540. This hair-splitting would lead to increased costs and complexity in litigation, which is at cross purposes with the "key objective" of Rule 11. *Id.* at 1540-41. However, five circuit judges expressed their strong disagreement, stating the firm should have made clear that the interpretation it was advocating was not established law. See *Golden Eagle Distrib.*, 809 F.2d at 586 (Noonan, J., dissenting from denial of sua sponte request for en banc hearing). Other circuits concur with this dissenting opinion and have held that if a jurisdiction clearly disfavors a particular lawyer's argument, then that lawyer must so state and argue for an extension or modification of law. See, e.g., *DeSisto College, Inc. v. Line*, 888 F.2d 755, 766 (11th Cir. 1989), cert. denied, 495 U.S. 952 (1990).

encompass SLAPPs because SLAPPs are couched as standard tort actions and will always be well rooted in existing law.

A court can levy Rule 11 sanctions if a lawsuit is filed specifically to harass or to delay.<sup>141</sup> The problem with SLAPPs is not their lack of arguable claims arising from arguable facts, but the impropriety of the SLAPP plaintiffs' motives. A SLAPP's *legal* basis invariably will be a standard tort principle; thus, the improper purpose component of Rule 11 is the only one applicable. One commentator argues that "unnecessary delay" can currently be sanctioned under Rule 11 and that any further, SLAPP-specific, judicial rule in this area would not be responsible.<sup>142</sup>

A growing minority trend among federal circuit courts calls for a link between enforcement of Rule 11 and lawyers' social responsibility—for reassessing lawyers' ethical obligations as divided between their clients and the public.<sup>143</sup> Under this approach, arguing a minority position or a position from dicta without identifying it as such, or failing to mention an unfavorable landmark decision—such as *J'Aire Corp. v. Gregory*—would itself constitute filing a suit "for any improper purpose."<sup>144</sup> The Ninth Circuit, however, does not follow this position,<sup>145</sup> nor would the Supreme Court.<sup>146</sup> And the standard of review for the imposition of sanctions by a trial court is abuse of discretion.<sup>147</sup> Because Rule 11 sanctions are leniently imposed, leniently reviewed, and do not yield a high enough fine to deter SLAPPs, Rule 11 will not prevent SLAPPs.

### 3. California Code of Civil Procedure Section 128.5

California's version of Rule 11, Code of Civil Procedure Section 128.5,<sup>148</sup> offers a plaintiff a more generous standard than the federal

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141. FED. R. CIV. P. 11; *Golden Eagle Distrib.*, 801 F.2d at 1537; see also *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986) (stating that new Rule 11 is intended to prevent misuse of "judicial procedures as a weapon for personal or economic harassment").

142. See *Sive*, *supra* note 29, at \*5-6. *Sive* also finds Rule 11 especially appropriate in the context of environmental SLAPPs, in which issues are usually of both law and fact rather than pure fact, so that Rule 11's emphasis on the lawyer's conduct rather than the client's is appropriate. *Id.* at \*5.

143. See, e.g., *DeSisto College, Inc.*, 888 F.2d at 755; *Golden Eagle Distrib.*, 809 F.2d at 586-89 (Noonan, J., dissenting from denial of sua sponte request for en banc hearing).

144. See, e.g., *DeSisto College*, 888 F.2d at 755; *Golden Eagle Distrib.*, 809 F.2d at 586-89 (Noonan, J., dissenting from denial of sua sponte request for en banc hearing).

145. *Golden Eagle Distrib.*, 801 F.2d at 1539-42.

146. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (applying reasonableness standard to determine whether suit was filed for improper purpose).

147. *Id.*

148. CAL. CIV. PROC. CODE § 128.5 (West 1982 & Supp. 1992).

rule.<sup>149</sup> A lawsuit must be frivolous to justify sanctions under section 128.5.<sup>150</sup> As with Rule 11, the sanction amounts awarded are small, so the deterrent effect is negligible.<sup>151</sup>

In sum, although one commentator lists lawyer disciplinary sanctions as an integral component of a reform program,<sup>152</sup> it appears that sanctions alone will not prevent SLAPPs. Neither the ethical codes nor the frivolous lawsuit rules are rigorously enforced. Sanction amounts, when awarded, are too small to deter. It is easy for the lawyer to argue that he or she was unaware of the underlying improper purpose, or under the ethical codes, that the improper purpose was not the only purpose. Finally, and perhaps most importantly, although courts have the power to award sanctions against clients, Rule 11 and section 128.5 may be more an incentive for a client to locate a less squeamish lawyer than to refrain from bringing the SLAPP at all.

### C. *Intentional Interference with Prospective Economic Advantage*

A SLAPP may be brought for intentional interference with prospective economic advantage, although the SLAPP defendant may be able to defeat some or all of the *prima facie* elements of this tort. Briefly, the elements of the tort of intentional interference with prospective business advantage are: (1) an existing economic relationship between plaintiff and a third party that probably will economically benefit plaintiff in the future; (2) defendant's knowledge of this relationship; (3) defendant's intentional and successful disruption of the relationship; and (4) damage proximately caused by the actions of the defendant.<sup>153</sup>

SLAPP cases have provided an important gloss on some of these elements. For example, the relationship between the SLAPP plaintiff and a third party must be *economic*, not regulatory. In *Asia Investment Co. v. Borowski*,<sup>154</sup> a city was the third-party plaintiff and the plaintiff developer was required to obtain permits from the city.<sup>155</sup> The court held that the developer and the city were not in an economic relationship

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149. See Brecher, *supra* note 29, at 136-37.

150. CAL. CIV. PROC. CODE § 128.5. For comparable sanction rules from other states, see John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 457-68 (1986).

151. Brecher, *supra* note 29, at 137.

152. Cosentino, *supra* note 16, at 410, 417, 424, 427.

153. *Asia Inv. Co. v. Borowski*, 133 Cal. App. 3d 832, 840-41, 184 Cal. Rptr. 317, 323 (1982); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 129-130 (5th ed. 1984) (discussing interference with contractual relations and interference with prospective business advantage).

154. 133 Cal. App. 3d 832, 184 Cal. Rptr. 317 (1982).

155. *Id.* at 836, 184 Cal. Rptr. at 320.

and that the only economic relationship the plaintiff had (if any) was with future home buyers.<sup>156</sup> In addition, because the development had not yet been approved, the court found that there was no "existing relationship" with which the defendant could have tortiously interfered.<sup>157</sup> More importantly in the SLAPP context, no privileged statement can constitute such tortious interference.<sup>158</sup> As with all defenses against prima facie elements of SLAPPS, these substantive defenses allow defendants to win at trial, but do not thwart a SLAPP's effectiveness in delaying or intimidating.

#### D. Defamation and Opinion

In the SLAPP context, which often involves environmentalists and slow-growth activists speaking out against development projects, the most relevant aspect of defamation jurisprudence is the opinion privilege.<sup>159</sup> In the wake of the Supreme Court's recent decision in *Milkovich v. Lorain Journal Co.*,<sup>160</sup> federal courts do not expressly recognize a separate opinion privilege.<sup>161</sup> The analysis of allegedly defamatory language in this context, however, remains largely unchanged. Both California and federal courts examine the language itself and its backdrop in the actual publication, as well as in its larger social and political setting.<sup>162</sup> They consider whether that language is mere puffing or political bluster

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156. *Id.* at 841, 184 Cal. Rptr. at 323.

157. *Id.*

158. *See id.* at 841-42, 184 Cal. Rptr. at 323-24 (explaining that privileged statement is one that falls within ambit of California Civil Code § 47, which was enacted to provide litigants utmost freedom of access to courts without fear of retaliatory lawsuits); *Brody v. Montalbano*, 87 Cal. App. 3d 725, 738, 151 Cal. Rptr. 206, 215 (1978), *cert. denied*, 444 U.S. 844 (1979); *Lowell v. Mother's Cake & Cookie Co.*, 79 Cal. App. 3d 13, 20, 144 Cal. Rptr. 664, 669 (1978). These cases involved the absolute privilege for communications during legislative or judicial proceedings under California Civil Code § 47(2) (West 1982) (now codified at CAL. CIV. CODE § 47(b) (West Supp. 1992)). *See infra* text accompanying note 215.

159. The opinion privilege originally stemmed from dicta in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974): "[T]here is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.*; *see also* *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783 (9th Cir. 1980) (upholding principle that statements of opinion are not actionable); *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 600-01, 552 P.2d 425, 427-28, 131 Cal. Rptr. 641, 643-44 (1976) (holding that statements of opinion are constitutionally protected and not subject to suit for libel).

160. 110 S. Ct. 2695 (1990).

161. *Id.* at 2707.

162. *See, e.g., id.* at 2704-05; *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 727 (1st Cir.), *cert. denied*, 112 S. Ct. 2942 (1992); *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 264-68, 721 P.2d 87, 93-96, 228 Cal. Rptr. 206, 212-15 (1986), *cert. denied*, 479 U.S. 1032 (1987).

during a heated debate, or whether it conveys undisclosed knowledge of wrongdoing of which the defendant is accusing the plaintiff.<sup>163</sup>

The "undisclosed facts" analysis is parallel to that found in section 566 of the *Restatement (Second) of Torts*.<sup>164</sup> The Court in *Milkovich* held that statements about matters of public concern that "imply an assertion of objective fact" that is both false and defaming, are actionable.<sup>165</sup> The crux of the analysis is whether the alleged defamation actually accused the plaintiff of some verifiable wrongdoing or crime. For example, the *Milkovich* majority believed that the defendant's column accused the plaintiff of committing perjury.<sup>166</sup>

In contrast, had the defendant accused the plaintiff of being "a jerk," this would have been a nonactionable opinion or "rhetorical hyperbole."<sup>167</sup> The defendant in *Myers v. Plan Takoma, Inc.*<sup>168</sup> used the word "shady" to describe the plaintiff bar owners. The court found this language to be rhetorical hyperbole because "shady" is an opinion word that cannot be proven true or false and because it does not depend on undisclosed facts.<sup>169</sup> Similarly, the defendant in *Letter Carriers v. Austin* used Jack London's famous characterization of a scab as "'a traitor to his god, his country, his family and his class'" to describe the plaintiff.<sup>170</sup> The Supreme Court easily rejected the plaintiff's contention that the defendant was literally accusing the plaintiff of treason against the United States.<sup>171</sup> In *Karnell v. Campbell*<sup>172</sup> the defendant's statements that the

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163. *Milkovich*, 110 S. Ct. at 2705-07; *Weller v. American Broadcasting Cos.*, 232 Cal. App. 3d 991, 999, 283 Cal. Rptr. 644, 649 (1991).

164. RESTATEMENT (SECOND) OF TORTS § 566 (1965); see, e.g., *Milkovich*, 110 S. Ct. at 2710 n.3 (Brennan, J., dissenting); *Okun v. Superior Court*, 29 Cal. 3d 442, 451-52, 629 P.2d 1369, 1374, 175 Cal. Rptr. 157, 162, cert. denied, 454 U.S. 1099 (1981).

165. *Milkovich*, 110 S. Ct. at 2705-06.

166. *Id.* at 2707.

167. *Id.* at 2705.

168. 472 A.2d 44 (D.C. 1983).

169. *Id.* at 48; see also *Okun*, 29 Cal. 3d at 452, 629 P.2d at 1374-75, 175 Cal. Rptr. at 451-52 (stating that defendant's editorializing words such as "mysterious" and "amazingly" implied no hidden knowledge but rather colored defendant's letters to newspaper with opinion).

170. *Letter Carriers v. Austin*, 418 U.S. 264, 268 (1974) (quoting "a well known piece of trade union literature, generally attributed to author Jack London," entitled *The Scab*).

171. *Id.* at 284; see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (noting jury determination that ad parody did not describe actual facts about plaintiff); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (holding that no reader could have believed speaker's use of word "blackmail" at public meeting meant speaker was accusing plaintiff of blackmail). In *Hustler*, evangelist Jerry Falwell sued *Hustler Magazine* over a satiric ad parody that portrayed Falwell as a drunken reprobate having sex with his mother in an outhouse. 485 U.S. at 48. The *Hustler* Court decided that none of these depictions could "reasonably be understood as describing actual facts about" plaintiff Jerry Falwell. *Id.* at 57.

172. 501 A.2d 1029 (N.J. Super. Ct. App. Div. 1985).

plaintiff developer "robbed" and "raped" the defendant's town; got favorable zoning breaks "under false pretenses" and through "clever maneuvering"; and had to have known about a town government appraisal mistake<sup>173</sup> were found by the court to be rhetorical and postured, because the statements implied no unknown facts.<sup>174</sup>

California and federal courts have adopted the "totality of circumstances" analysis from the seminal case of *Ollman v. Evans*.<sup>175</sup> Essentially, this analysis looks at the speech, first by itself and then in its larger context.<sup>176</sup> The rhetorical, posturing epithets just described are good illustrations of specific language that is not actionable. In addition, some courts have emphasized qualifying words that express doubt, such as "seems" or "appears."<sup>177</sup> Simply adding such qualifiers, however, will not sanitize otherwise defamatory remarks.<sup>178</sup> The *Milkovich* majority pointed out that "the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar,' " and that such a "statement may still imply a false assertion of fact."<sup>179</sup>

The totality of the circumstances analysis always considers the statements at issue as a whole and within their larger contexts.<sup>180</sup> The typical SLAPP context of a political row involving a citizen, environmentalist or

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173. *Id.* at 1032.

174. *Id.* at 1035-36.

175. 750 F.2d 970, 979 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985). Under the four-prong *Ollman* test, the court reviews: (1) the specific language itself; (2) the entire publication; (3) the surrounding circumstances; and (4) a reasonable viewer or reader reaction. *Id.* at 979. Other courts have applied a similar three-prong test which includes: (1) a reasonable viewer or reader reaction; (2) the surrounding circumstances; and (3) the specific language itself. *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783-84 (9th Cir. 1980); *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 260-61, 721 P.2d 87, 90-91, 228 Cal. Rptr. 206, 209-10 (1986), *cert. denied*, 479 U.S. 1032 (1987).

176. *Ollman*, 750 F.2d at 979.

177. *Genesis*, 611 F.2d at 784; *see also Milkovich*, 110 S. Ct. at 2712 (Brennan, J., dissenting) (noting that "when the reasonable reader encounters cautionary language, he tends to 'discount that which follows'" (quoting *Ollman v. Evans*, 750 F.2d 970, 983 (1984), *cert. denied*, 471 U.S. 1127 (1985))).

178. *Compare Milkovich*, 110 S. Ct. at 2706 ("[It] would be destructive of the law of libel if a writer could escape liability . . . simply by using . . . the words 'I think.'" (alteration in original) (quoting *Cianci v. New York Times Publishing Co.*, 639 F.2d 54, 64 (2d Cir. 1980))) with *Carr v. Warden*, 159 Cal. App. 3d 1166, 1168-69, 206 Cal. Rptr. 162, 163 (1984) (holding that "I think" was enough to signal opinion rather than fact).

179. *Milkovich*, 110 S. Ct. at 2706.

180. *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 260-61, 721 P.2d 87, 90-91, 228 Cal. Rptr. 206, 209 (1986), *cert. denied*, 479 U.S. 1032 (1987); *Hoffman Co. v. E.I. Du Pont de Nemours & Co.*, 202 Cal. App. 3d 390, 398, 248 Cal. Rptr. 384, 388 (1988); *see also Genesis*, 611 F.2d at 783-84 (stating that words alone are not indicative of defamation unless surrounding facts are also considered).

other protest group, will tend to suggest that verbal or written accusations are nonactionable rhetorical hyperbole.<sup>181</sup>

The *Milkovich* opinion explicitly denied that the famous dicta in *Gertz v. Robert Welch, Inc.*<sup>182</sup>—"there is no such thing as a false idea"—had created a separate opinion privilege under the First Amendment.<sup>183</sup> Both the majority<sup>184</sup> and the dissent<sup>185</sup> stated that the existing constitutional protections are adequate to protect freedom of expression without the addition of a separate opinion privilege. These protections include: (1) the *Philadelphia Newspapers, Inc. v. Hepps*<sup>186</sup> requirement that a defamation plaintiff show the falsity of the statements on matters of public concern that are at issue; (2) the rhetorical hyperbole and totality of the circumstances analyses; and (3) the fault standards from *New York Times Co. v. Sullivan*<sup>187</sup> and *Gertz*.<sup>188</sup> *Milkovich* is expressly based on the Federal Constitution and in fact the Court rejected the defendants' independent state grounds argument.<sup>189</sup> As long as California courts follow the perimeters of *Michigan v. Long*,<sup>190</sup> they could reaffirm a separate opinion privilege under the California Constitution.

Finally, *Milkovich* reconfirmed the *New York Times Co.* actual malice standard, which was initially applied to public officials and later extended to public figures.<sup>191</sup> Note that public-figure status need not be

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181. *Wegis v. J.G. Boswell Co.*, No. F011230, slip op. at 8-9 (Cal. Ct. App. June 14, 1991) (finding that ad published by defendant farmers in context of "heated political campaign" over Peripheral Canal contained "clear speculation"). But the *Milkovich* majority rejects a small-town setting as a factor, 110 S. Ct. at 2707 n.9, and ignores the sports-page context, which the state supreme court found "a traditional haven for cajoling, invective, and hyperbole," *id.* at 2701 n.4. Contrast *Ollman*, which stated that the context of an Op-Ed page article clearly indicated opinion. 750 F.2d at 985.

182. 418 U.S. 323, 339 (1974).

183. *Milkovich*, 110 S. Ct. at 2705.

184. *Id.* at 2706-07.

185. *Id.* at 2708 (Brennan, J., dissenting).

186. 475 U.S. 767, 777-78 (1986).

187. 376 U.S. 254, 279-80 (1964).

188. 418 U.S. at 347.

189. *Milkovich*, 110 S. Ct. at 2701 n.5.

190. 463 U.S. 1032 (1983) (holding that state court opinions are presumed to be based on federal constitutional grounds unless opinion clearly states that it is based on adequate and independent state grounds). The Lockyer bill addressed the "right of petition or free speech under the United States or California Constitution," thus leaving open an independent state grounds reading of this anti-SLAPP bill. Act of Sept. 16, 1992 § 2 (to be codified at CAL. CIV. PROC. CODE § 425.16(b)).

191. See *Milkovich*, 110 S. Ct. at 2703; see also *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 134 (1967) (applying actual malice standard when plaintiff is public figure); *New York Times Co.*, 376 U.S. at 279-80, 285-86 (plaintiff must show with "convincing clarity" that defendant had actual malice, requiring intentional or reckless disregard of defamatory statement's falsity).

permanent. Plaintiffs who prominently hold themselves out in the community on one particular matter or project are public figures as to that one matter or project.<sup>192</sup> Thus, SLAPP plaintiffs must often show actual malice by clear and convincing evidence, even though those plaintiffs are otherwise private individuals.<sup>193</sup> In New York, the Gaffney-Lavalle Bill mandates an actual malice standard in defamation cases in which a plaintiff applies to a public agency for a permit or license, by making the plaintiff a public figure statutorily.<sup>194</sup>

Overall, then, defamation law affords both SLAPP plaintiffs and defendants their respective protections. If a plaintiff stands accused of actual verifiable wrongdoing and can prove reckless disregard on the part of the defendants, the plaintiff's defamation action will lie. On the other hand, defendants hurling opinionated and even outrageous epithets in the course of a heated political battle, without literally accusing plaintiffs of crimes or actual wrongdoing, can expect the full protection of the Constitution.

*E. The Right to Petition the Government; Petitioning Privileges; and the Noerr/Pennington Doctrine*

1. The right and its importance

The right to petition the government for redress of grievances protects citizens' rights of political advocacy.<sup>195</sup> Petitioning activity includes lobbying the government, suing, testifying, demonstrating peacefully, writing letters and boycotting.<sup>196</sup> First Amendment rights include "[t]he right of public debate, including the right to publish truthful statements, the right to demonstrate in public and the right to report violations or make complaints to government bodies."<sup>197</sup> Courts will not interfere with the exercise of the right to petition absent sham or fraud,

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192. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 164 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976).

193. See *Milkovich*, 110 S. Ct. at 2703-04.

194. *McEvoy*, *supra* note 4, at 528.

195. See U.S. CONST. amend. I.

196. See *Pring*, *supra* note 1, at 9-12. In *Missouri v. NOW*, 467 F. Supp. 289 (W.D. Mo. 1979), NOW's concerted effort to boycott conventions in Missouri—a state that did not ratify the Equal Rights Amendment—was held to be conspiratorial but privileged because it was political, rather than economic or commercial. *Id.* at 304-06. NOW's First Amendment rights to petition and freely associate "outweigh[ed Missouri's] interest in protecting the business expectancy involved." *Id.* at 305-06.

197. *Goedert*, *supra* note 15, at 1003; see also *Boyle*, *supra* note 13, at 9 (describing Jay Property SLAPP, in which "an alliance of local, county and state civic, historical and environmental groups calling itself the Jay Coalition" got county to acquire plaintiff's development land by eminent domain because of its historic value).



or in some cases, even with sham or fraud.<sup>198</sup> The activity need not entail direct contact with the government or its representatives in order to be constitutionally protected as petitioning activity. For example, in *Webb v. Fury*,<sup>199</sup> the court held that the defendant's newsletter was protected, even if the defendant's motive was subjectively malicious: "The right to petition includes . . . activity designed to influence public sentiment concerning the passage and enforcement of laws as well as appeals for redress made directly to the government."<sup>200</sup>

The right to petition is a powerful constitutional right and the most effective defense to a SLAPP.<sup>201</sup> California and federal courts repeatedly stress the fundamental and paramount importance of the right to petition.<sup>202</sup> A defendant's failure to raise the right to petition defense does not waive it.<sup>203</sup> Some state courts have found that the petition defense to SLAPPs is superior to defamation defenses such as those relating to the opinion-fact dichotomy, because petitioning may be privileged even if it includes knowingly false statements.<sup>204</sup> And the right to petition does

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198. See, e.g., *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972); *Sierra Club v. Butz*, 349 F. Supp. 934, 937-39 (N.D. Cal. 1972). See *infra* notes 212-23 and accompanying text for a discussion of the sham exception and absolute privileges.

199. 282 S.E.2d 28 (W. Va. 1981).

200. *Id.* at 42.

201. Pring's study found that "raising the Petition Clause defense almost doubled [defendants'] chances of ultimately winning: [Defendants] won 57 percent of those SLAPPs in which the Petition Clause was never invoked, but 92 percent of those SLAPPs in which it was." Pring, *supra* note 15, at \*37.

Note that SLAPP defendants' First Amendment rights, through the Due Process Clause of the Fifth and Fourteenth Amendments, can provide defenses to SLAPPs by *private* as well as public plaintiffs. See *Paradise Hills Assocs. v. Procel*, 235 Cal. App. 3d 1528, 1544, 1 Cal. Rptr. 2d 514, 522 (1991). The "state action" requirement of the Fourteenth Amendment's Due Process Clause is satisfied by the mere involvement of the legal system as an instrument of the state. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Edwards v. Habib*, 397 F.2d 687, 691-97 (1968), *cert. denied*, 393 U.S. 1016 (1969).

202. See, e.g., *United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967); *Butz*, 349 F. Supp. at 936; *Matossian v. Fahmie*, 101 Cal. App. 3d 128, 135, 161 Cal. Rptr. 532, 535 (1980) (citing *American Civil Liberties Union v. Board of Educ.*, 55 Cal. 2d 167, 10 Cal. Rptr. 647, 359 P.2d 45, *cert. denied*, 368 U.S. 819 (1961)); see also *Edwards*, 397 F.2d at 690 n.7 (noting "it is clear beyond peradventure that [the right of the people to petition the government for redress of grievances] is at the core of protected First Amendment speech.").

203. See *Anchorage Joint Venture v. Anchorage Condominium Ass'n*, 670 P.2d 1249, 1251 (Colo. Ct. App. 1983).

204. See *Webb*, 282 S.E.2d at 42-43 (finding malice standard inappropriate in petition cases and concluding statements in publication absolutely privileged under First Amendment).

The dissent in *Webb* took issue with the court's disregard of malice. *Id.* at 43 (Neely, J., dissenting). Dissenting Justice Neely opined that there should be no absolute privilege for petitioning activity and that knowingly false or fraudulent petitioning should not be protected. *Id.* at 44-45 (Neely, J., dissenting). Both the majority and the dissent seemed to agree, however, that if petitioning is merely to stop a competitor—or for some other sham purpose—and

not hinge on the case's outcome on the merits.<sup>205</sup> California courts have afforded defendants a potent petitioning privilege even if a plaintiff can show that a defendant was malicious.<sup>206</sup> Significantly, the United States Supreme Court, in *McDonald v. Smith*,<sup>207</sup> expressly stated that petitioning activity is not absolutely privileged and that "there is no sound basis for granting greater constitutional protection to statements made in a petition . . . than other First Amendment expressions."<sup>208</sup>

Although the tolerance of actual malice is not entirely clear, courts have universally declared that common-law malice, or ill will, will not defeat the petitioning privilege.<sup>209</sup> Because people or companies do not usually petition the government unless they have some personal or financial interest at stake, allowing personal bias or common-law malice to neutralize their petitioning privilege would effectively eliminate this privilege in all but those rare instances in which a citizen or group sought government participation solely for altruistic or civic-minded purposes.<sup>210</sup> The landmark Supreme Court case of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>211</sup> extended the petitioning privilege to defendants who were financially interested in the subject matter of their petitioning, and were therefore inferably malicious or at least selfishly motivated.

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not to influence the government, then it should not be privileged. *Id.* at 42-43; *id.* at 46 (Neely, J., dissenting).

205. *Matossian*, 101 Cal. App. 3d at 137, 161 Cal. Rptr. at 536.

206. *Id.*, 161 Cal. Rptr. at 537. These California courts followed the holdings in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). Brecher reads *Matossian* as declaring an *absolute* privilege in California, Brecher, *supra* note 29, at 120-21, but actually the case merely confirmed the irrelevance of common-law malice—self-interested motivation or ill will—in petitioning cases. *Matossian*, 101 Cal. App. 3d at 137, 161 Cal. Rptr. at 536. In fact, *Matossian* held onto the *Noerr/Pennington* sham exception. *Id.* at 138-39, 161 Cal. Rptr. at 537-38.

207. 472 U.S. 479 (1985).

208. *Id.* at 485 (applying *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), actual malice standard).

209. *Id.*; *Sierra Club v. Butz*, 349 F. Supp. 934, 938 (N.D. Cal. 1972); *Anchorage Joint Venture v. Anchorage Condominium Ass'n*, 670 P.2d 1249, 1251 (Colo. Ct. App. 1983); see Brecher, *supra* note 29, at 119.

210. *Butz*, 349 F. Supp. at 938; *Matossian*, 101 Cal. App. 3d at 138-39, 161 Cal. Rptr. at 537.

211. 365 U.S. 127, 139 (1961).

## 2. The *Noerr/Pennington* sham exception to the petitioning privilege

Under the *Noerr/Pennington* doctrine, or sham exception rule,<sup>212</sup> petitioning activity must at least partly make an attempt to influence government. Petitioning cannot be, for example, completely to prevent a competitor from gaining access to government; the petitioner must be genuinely seeking redress.<sup>213</sup> A Massachusetts court in *Bell v. Mazza*<sup>214</sup> refused to immunize petitioning per se. The plaintiffs sued on a theory of interference with constitutional property rights (their right to build a tennis court), and the defendants allegedly threatened, intimidated and coerced them in response;<sup>215</sup> the fact of the defendants' petitioning activity in conjunction with the case was not sufficient for the court to dismiss the plaintiffs' state civil rights claim, especially considering the defendants' alleged wrongdoing.<sup>216</sup>

Under the sham exception, a party's petitioning activity will not be constitutionally protected if it is *solely* for an improper purpose such as blocking another party's access to government or gaining an unfair advantage over a competitor. Basically, a party *may* have one of those malicious motives as long as it has some other, legitimate reason for its petitioning. As discussed, the petitioning defendant's "intent is irrelevant,"<sup>217</sup> except to the extent that a petition containing damaging falsehoods made with actual malice may remove the petitioner's privilege.<sup>218</sup> The majority in *Webb v. Fury* drew the line at whether the defendant's petitioning activity actually blocked the plaintiff's own access to government.<sup>219</sup> In *Protect Our Mountain Environment, Inc. v. District Court*,<sup>220</sup>

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212. The original line of cases articulating the Supreme Court's sham exception rules was in the antitrust area. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Noerr Motor Freight, Inc.*, 365 U.S. at 144. Subsequent courts, however, have applied the sham exception outside the antitrust setting. See, e.g., *Matossian*, 101 Cal. App. 3d at 136-37, 161 Cal. Rptr. at 536; *Protect Our Mountain Env't, Inc. v. District Court*, 677 P.2d 1361, 1366 (Colo. 1984).

213. *Webb v. Fury*, 282 S.E.2d 28, 36 (W. Va. 1981).

214. 474 N.E.2d 1111 (Mass. 1985).

215. *Id.* at 1114. The defendant allegedly threatened to sue the plaintiffs' contractor, tried to induce the electric company to discontinue the plaintiffs' electric service, physically blocked one plaintiff's passage, and shouted "intemperate epithets." *Id.*

216. *Id.* at 1112-16.

217. *Webb*, 282 S.E.2d at 41.

218. *McDonald v. Smith*, 472 U.S. 479, 483-85 (1985); see *supra* notes 209-11 and accompanying text.

219. *Webb*, 282 S.E.2d at 39-40 (holding that defendant must have "a design to thwart the plaintiff's input into the political process. Conduct which prevents a party from participating in [any of the] branches of government is not petitioning activity protected by" First Amendment (citation omitted)).

220. 677 P.2d 1361, 1367-69 (Colo. 1984).

a Colorado court broke the sham exception into three elements. To defeat defendant's petitioning privilege, plaintiff must show that: (1) defendant's petitioning claims are without reasonable factual or legal basis;<sup>221</sup> (2) defendant's "primary purpose . . . was to harass the plaintiff or to effectuate some other improper objective";<sup>222</sup> and (3) defendant's action "had the capacity to adversely affect a legal interest of the plaintiff."<sup>223</sup>

### 3. California's Section 47(b) privilege

California Civil Code Section 47(b) establishes a potent privilege for communications made during legislative or judicial proceedings.<sup>224</sup> The communication may be written or oral, and it may be a communication made outside formal agency proceedings in order "to prompt action by that agency."<sup>225</sup> But a privileged statement must have "some connection or logical relation" to the proceedings regardless of whether the statement is made outside the courtroom or hearing.<sup>226</sup> Any official proceed-

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221. *Id.* at 1369. The fact that the defendant *lost* in a previous suit in itself does not mean the previous suit was a sham. *Id.*

222. *Id.* Commentator Sive objects to this element because it encourages discovery into a defendant's motives. Sive, *supra* note 29, at \*4. Impropriety of motive, however, seems to be the essence both of the sham exception and the definition of SLAPPs in general. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972), provides good illustrations of improper motives, such as perjury, bribery and misrepresentation. In *California Motor Transp. Co.*, the true intent of the defendant allegedly was to prevent the plaintiffs from invoking the processes of administrative agencies and courts. *Id.* at 518 (Stewart, J., concurring). Similarly, in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), a private power company tried to freeze out municipal competitors and "preserve its predominant position in the sale and transmission of electric power in the area" through improper litigation. *Id.* at 379 (quoting *Otter Tail Power Co. v. United States*, 331 F. Supp. 54, 62 (D. Minn. 1971), *aff'd in part, vacated in part*, 410 U.S. 366 (1973)).

223. *Protect Our Mountain Env't*, 677 P.2d at 1369. This element is really just a standing requirement. Sive, *supra* note 29, at \*9.

224. CAL. CIV. CODE § 47(b) (West Supp. 1992); see also *Silberg v. Anderson*, 50 Cal. 3d 205, 215-16, 786 P.2d 365, 370, 266 Cal. Rptr. 638, 644-45 (1990) (stating that privilege is applicable to any communication, whether or not it amounts to publication); *Pettitt v. Levy*, 28 Cal. App. 3d 484, 488, 104 Cal. Rptr. 650, 652 (1972) (stating that privilege is absolute because it protects publications made with actual malice or with intent to do harm); Brecher, *supra* note 29, at 121 (stating that section establishes privilege for any publication or broadcast made during legislative or judicial proceeding or any other proceeding authorized by law).

225. *King v. Borges*, 28 Cal. App. 3d 27, 34, 104 Cal. Rptr. 414, 417 (1972).

226. *Silberg*, 50 Cal. 3d at 212, 786 P.2d at 369, 266 Cal. Rptr. at 642; accord *Asia Inv. Co. v. Borowski*, 133 Cal. App. 3d 832, 842, 184 Cal. Rptr. 317, 324 (1982). "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action." *Silberg*, 50 Cal. 3d at 212, 786 P.2d at 369, 266 Cal. Rptr. at 642.

ing authorized by law comes within the purview of Section 47(b).<sup>227</sup> The privilege also implies that defamatory statements made in "proceedings which resemble judicial and legislative proceedings, such as transactions of administrative boards and quasi-judicial and quasi-legislative proceedings . . . having some relation thereto are absolutely privileged."<sup>228</sup> Section 47(b) covers all papers and communications relating to litigation.<sup>229</sup> Although this statutory privilege may immunize petitioners from liability stemming from their statements, those statements may be used as evidence against the petitioners in a subsequent action.<sup>230</sup> The immunity applies regardless of actual or common-law malice.<sup>231</sup> This potent privilege can block many different tort actions, such as defamation, abuse of process and intentional interference with prospective economic advantage; subsequent malicious prosecution actions, however, are not barred by the Section 47(b) privilege.<sup>232</sup>

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227. CAL. CIV. CODE § 47(b) ("A privileged publication or broadcast is one made . . . [i]n any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law.").

228. *King*, 28 Cal. App. 3d at 32, 104 Cal. Rptr. at 416. The privilege's scope is broad, as agency investigations are also included. *See id.* Courts outside California have also recognized absolute privileges for communications and legislative proceedings. *See Walters v. Linhof*, 559 F. Supp. 1231, 1236-37 (D. Colo. 1983); McEvoy, *supra* note 4, at 520.

229. *See, e.g., Silberg*, 50 Cal. 3d at 213-14, 786 P.2d at 369-70, 266 Cal. Rptr. at 642-43 (discussing privileged status of statements by parties and witnesses under former Civil Code § 47(2), now codified at § 47(b)); *Asia Inv. Co.*, 133 Cal. App. 3d at 842, 184 Cal. Rptr. at 325 (petition for writ of mandate); *O'Neil v. Cunningham*, 118 Cal. App. 3d 466, 173 Cal. Rptr. 422 (1981) (settlement letters and statements in settlement conferences); *Lerette v. Dean Witter Org., Inc.*, 60 Cal. App. 3d 573, 578-79, 131 Cal. Rptr. 592, 595-96 (1976) (demand letters); *King*, 28 Cal. App. 3d at 32, 104 Cal. Rptr. at 416-17 (pleadings, except in dissolution of marriage actions); *Pettitt v. Levy*, 28 Cal. App. 3d 484, 488, 104 Cal. Rptr. 650, 652 (1972) (witness statements and statements by parties).

230. *See Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1168, 728 P.2d 1202, 1208-09, 232 Cal. Rptr. 567, 574 (1986). In *Oren's* predecessor action, the plaintiff neighbor tried to stop the defendant developer's construction by suing for California Environmental Quality Act (CEQA) violations. *Id.* at 1157, 728 P.2d at 1202, 232 Cal. Rptr. at 567. Then in *Oren*, the developer, now the plaintiff, claimed that the neighbor offered to drop his CEQA complaints for money and a lot in the proposed development. *Id.* at 1160-61, 728 P.2d at 1203, 232 Cal. Rptr. at 568-69. The California Supreme Court allowed the neighbor's alleged offer to be admitted into evidence in the second action (for abuse of process) even though the statement was privileged. *Id.* at 1170, 728 P.2d at 1210, 232 Cal. Rptr. at 575.

231. *Silberg*, 50 Cal. 3d at 216, 786 P.2d at 371, 266 Cal. Rptr. at 645; *Royer v. Steinberg*, 90 Cal. App. 3d 490, 498, 153 Cal. Rptr. 499, 504 (1979); *Brecher*, *supra* note 29, at 122. In *Pettitt*, 28 Cal. App. 3d 484, 104 Cal. Rptr. 650, the court granted immunity to defendants who forged an official application, and in *Kachig v. Boothe*, 22 Cal. App. 3d 626, 99 Cal. Rptr. 393 (1971), the court immunized perjury.

232. *Silberg*, 50 Cal. 3d at 216, 786 P.2d at 371, 266 Cal. Rptr. at 644 (discussing former Civil Code § 47(2), now codified at § 47(b)).

The constitutional right to petition and California's statutory privilege for communications during legislative or judicial proceedings under Section 47(b) are the strongest defenses available to SLAPP defendants.<sup>233</sup> Successfully raising these defenses at an early dismissal stage may undercut significantly the SLAPP plaintiff's efforts at intimidation, expense and delay. A SLAPP defendant will need companion protections as well, however, to eliminate the effects of the SLAPP. Only the specter of serious negative consequences will deter SLAPP plaintiffs.<sup>234</sup> The defenses discussed above can only counter a SLAPP once it is filed; they cannot deter the plaintiff from filing it.

## V. SUBSTANTIVE REMEDIES: SLAPP-BACKS

SLAPP-backs are separate countersuits or counterclaims to SLAPPS, usually for abuse of process or malicious prosecution, by SLAPP defendants. There is debate as to their effectiveness. While they may allow vindication, a SLAPP-back victory may be too little, too late. SLAPP-back theories are either rare and elusive—as with the constitutional tort theory in *Laguna Publishing Co. v. Golden Rain Foundation*<sup>235</sup>—or disfavored and difficult to prove—as with abuse of process and malicious prosecution.

The prospect of huge damage awards for the original SLAPP defendants "particularly in California,"<sup>236</sup> may well discourage the initial filings of SLAPPS.<sup>237</sup> Business groups and SLAPP plaintiffs contend that "the anti-SLAPP campaign could itself intrude on important legal rights . . . [and] could deter businesses and others from going to court with legitimate grievances because of the threat of big jury awards."<sup>238</sup> Spectacular damage awards in SLAPP-backs are widely publicized<sup>239</sup> but

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233. See CAL. CIV. CODE § 47(b).

234. See *infra* part VI discussing damages and attorney's fees.

235. 131 Cal. App. 3d 816, 853-54, 182 Cal. Rptr. 813, 817 (1982), *appeal dismissed*, 459 U.S. 1192 (1983); see also Costantini & Nash, *supra* note 4, at 445-46 (discussing briefly SLAPP-back theories).

236. Boyle, *supra* note 13, at 8. For example, three farmers eventually won a multi-million dollar judgment against agribusiness giant J.G. Boswell Company. Costantini & Nash, *supra* note 4, at 426.

237. Clavin, *supra* note 61, at 51.

238. Hager, *supra* note 18, at A3. Ron Galperin quotes law professor and development consultant Gideon Kanner: "These people [anti-development advocates] come out of the woodwork' . . . and have become 'drunk with power.' . . . [H]is advice to developers thinking about a lawsuit is 'don't do it.'" Galperin, *supra* note 4, at K15 (alteration in original).

239. See, e.g., Costantini & Nash, *supra* note 4, at 426 (jury awarded plaintiff \$13 million against defendant J.G. Boswell Company in *Thompson v. J.G. Boswell Co.*, No. 179027 (Cal. Super. Ct. Kern County July 14, 1988)); Boyle, *supra* note 13, at 8 (reporting on SLAPP-back suits involving J.G. Boswell Company and Shell Oil Corporation); Clavin, *supra* note 61, at 51

notably infrequent.<sup>240</sup> Greater publicity can exert only a *negative* effect on SLAPP filings, but sources disagree over whether it has had any effect at all.<sup>241</sup> Ironically, well-publicized successful SLAPP-backs may also discourage legitimate plaintiffs from filing colorable claims—as opposed to SLAPPs. All of these considerations, of course, depend on the average size of the awards. If modest, potential SLAPP plaintiffs may include SLAPP-back awards with costs and fees as an acceptable cost of doing business.

Despite the questionable chilling effect of SLAPP-back awards, SLAPP-backs do not actually prevent the negative effects of SLAPPs, such as delay, initial cost and intimidation. Additionally, a SLAPP defendant cannot bring a malicious prosecution SLAPP-back until the SLAPP has terminated in the defendant's favor.<sup>242</sup> By the time a SLAPP victim can win a SLAPP-back years later, a plaintiff developer has probably long since broken ground or obtained government approval. Furthermore, the dim prospect of a SLAPP-back victory usually will not alleviate the chill of a SLAPP for the typical SLAPP defendant. Nor will most defendants be able to cover the litigation costs up front. Finally, a SLAPP-back will tie up a protest group's resources even longer than defending a SLAPP.

In addition a SLAPP-back plaintiff—the original SLAPP defendant—may not be able to meet the requisite burden of proof on the merits. A malicious prosecution plaintiff, for example, must show that the plaintiff in the original suit had no probable cause to sue,<sup>243</sup> which is a difficult threshold showing.

The SLAPP-back theories outlined below all share the elements of intent and damage.<sup>244</sup> Commentators Costantini and Nash's analysis of

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(describing SLAPP-back suit against Shell Oil Corporation); *Slapping back at SLAPP suits*, *supra* note 18, at B6.

240. The best known case of a court awarding such large damages is found in *Thompson v. J.G. Boswell Co.*, No. 179027 (Cal. Super. Ct. Kern County July 14, 1988), *aff'd*, *Wegis v. J.G. Boswell Co.*, No. F011230 (Cal. Ct. App. June 14, 1991).

241. Compare Hager, *supra* note 18, at A3 ("now the tide seems to be turning" and SLAPP-backs are deterring SLAPPs) with Galperin, *supra* note 4, at K1 (noting that SLAPP suits are on rise).

242. *Babb v. Superior Court*, 3 Cal. 3d 841, 845-48, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971); *Asia Inv. Co. v. Borowski*, 133 Cal. App. 3d 832, 837-38, 184 Cal. Rptr. 317, 321 (1982); Brecher, *supra* note 29, at 138. See *infra* text accompanying notes 290-304 for proposals to modify this element so as to permit a counterclaim for malicious prosecution as part of the initial SLAPP.

243. *Singleton v. Perry*, 45 Cal. 2d 489, 494, 289 P.2d 794, 798 (1955); *Jaffe v. Stone*, 18 Cal. 2d 146, 149, 114 P.2d 335, 337 (1941).

244. See *infra* notes 252-300 and accompanying text.

the *Thompson v. J.G. Boswell Co.*<sup>245</sup> case illustrates the pitfalls of proving wrongful intent on the part of the original SLAPP plaintiff.<sup>246</sup> The largest farming company in California, the J.G. Boswell Company, SLAPPED three small farmers who had taken out a newspaper advertisement opposing Boswell's position on the hotly contested Peripheral Canal.<sup>247</sup> In the first trial the judge rejected Boswell's libel claim because a reasonable reader could in no way infer allegations of an actual conspiracy from the advertisement.<sup>248</sup> In the second action, the SLAPP-back, the plaintiffs had to prove Boswell's wrongful intent in the first action through both circumstantial and direct evidence.<sup>249</sup> The circumstantial evidence of ulterior motives pointed out that Boswell was rich, sophisticated and politically powerful<sup>250</sup>—he had his own political action committee; he had invested over \$1 million before the advertisement appeared in the newspaper and wanted to protect his investment; and he often played "hardball," which included using litigation and boycotting suppliers who did not support his political causes.<sup>251</sup> Direct evidence that the first action was not brought in good faith showed that Boswell never investigated his alleged losses from damage to his reputation; he consulted inexperienced local counsel rather than his regularly retained large firm; and he decided to sue even before consulting his local lawyer.<sup>252</sup>

#### A. Abuse of Process

Abuse of process entails using an otherwise proper or legitimate lawsuit for some improper, collateral purpose. Its elements are: (1) an "ulterior motive"; (2) wrongful use of process;<sup>253</sup> and (3) proximate causation of damage or harm.<sup>254</sup> A plaintiff in the first action—the de-

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245. No. 179027 (Cal. Super. Ct. Kern County July 14, 1988), *aff'd*, *Wegis v. J.G. Boswell Co.*, No. F011230 (Cal. Ct. App. June 14, 1991).

246. Costantini & Nash, *supra* note 4, at 446-64.

247. *Id.* at 428. The Peripheral Canal proposition would provide an alternative method of transporting water to the arid part of the state.

248. *Id.* at 440.

249. *Id.* at 446-47.

250. *Id.* at 454-57.

251. *Id.* at 448.

252. *Id.* at 463. It should be noted that, although the Family Farmers won their SLAPP-back suit against the J.G. Boswell Company, Boswell's original libel suit effectively silenced the Family Farmers for the remainder of the political battle over the Peripheral Canal. *Id.* at 470.

253. Brecher, *supra* note 29, at 128.

254. Costantini & Nash, *supra* note 4, at 444-45. As with the petitioning defense, defendant's common-law malice or ill will is not a sufficient "ulterior motive," or most suits would qualify. *Id.* at 445.



fendant in the abuse of process SLAPP-back—must have used the first lawsuit as a threat or to blackmail. For example, in *Spellens v. Spellens*, the California Supreme Court found that the defendant husband had abused the process of the courts against his plaintiff wife.<sup>255</sup> When the plaintiff wife sued her husband for marriage by estoppel, the husband tried to seize the wife's car, not because he thought he had a legitimate claim to the car but because he wanted to force his wife to drop her main cause of action.<sup>256</sup>

Abuse of process and malicious prosecution have distinct focuses. Abuse of process aims at properly issued process that is subsequently used "as a threat or a club, . . . a form of extortion."<sup>257</sup> Malicious prosecution, on the other hand, focuses on an action that never should have been brought.<sup>258</sup> Abuse of process, then, is procedural in that it is unrelated to the merits of the underlying original action.<sup>259</sup> Consequently, a plaintiff in the second suit or counterclaimant in the first suit need not *win* a first suit on the merits before initiating an abuse of process action.<sup>260</sup> Nor is the initial plaintiff's probable cause to bring the SLAPP relevant in an abuse of process case. Therefore, the abuse of process theory may be attractive to a defendant when the plaintiff's initial action was legitimate—that is, not a SLAPP. To illustrate, assume a defendant really defamed a plaintiff; but when the plaintiff later makes it clear in a private conference that the defamation action is solely to force the defendant to drop the defendant's collateral complaint to an environmental agency about the plaintiff's development, the defendant may have an abuse of process claim.

### B. Malicious Prosecution

The most common SLAPP-back theory is malicious prosecution. Huge potential damage awards are its major attraction. Its major drawback is the delay caused by the prima facie requirement that the malicious prosecution plaintiff must have won the initial suit in which he or

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255. *Spellens v. Spellens*, 49 Cal. 2d 210, 233, 317 P.2d 613, 627 (1957).

256. *Id.* at 230, 317 P.2d at 625.

257. *Id.* at 232, 317 P.2d at 627 (quoting WILLIAM L. PROSSER, PROSSER ON TORTS § 100 (2d ed. 1955)); see also *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1169, 728 P.2d 1202, 1209-10, 232 Cal. Rptr. 567, 575 (1986) (explaining that "lack of probable cause" element of malicious prosecution cannot be circumvented by expanding abuse of process to encompass alleged improper filing of lawsuit).

258. *Spellens*, 49 Cal. 2d at 232, 317 P.2d at 626; see *infra* part V.B for a discussion of malicious prosecution.

259. *Spellens*, 49 Cal. 2d at 232, 317 P.2d at 626.

260. McEvoy, *supra* note 4, at 527.

she was the defendant.<sup>261</sup> Much of the scholarly discussion on malicious prosecution in the SLAPP context centers around this latter element, of which some commentators have proposed modifications such as allowing malicious prosecution as a counterclaim in the initial action, the SLAPP, rather than waiting until the second action, the SLAPP-back.<sup>262</sup>

The prima facie elements of malicious prosecution are as follows. The plaintiff must show that the defendant "initiated or took an active part in the commencement or maintenance of" the first—malicious—action.<sup>263</sup> The malicious prosecution plaintiff must have won the first action, or the action must have "terminated in plaintiff's favor."<sup>264</sup> The defendant must not have had probable cause for bringing or maintaining the first suit<sup>265</sup>—the SLAPP. Finally, plaintiff must show that the original plaintiff filed the first action maliciously, for an improper purpose.<sup>266</sup> In malicious prosecution, the filing of the suit itself is improper because the plaintiff had no probable cause and a malicious purpose.<sup>267</sup> Basically, the malicious prosecution plaintiff contends that the predecessor action was brought without any "relation to the merits of the claim" and that the original plaintiff did not believe that claim was valid.<sup>268</sup>

Malicious prosecution defendants have an advice-of-counsel defense.<sup>269</sup> To successfully raise this defense, defendants must show that they acted in good faith in seeking and in following their lawyer's advice during the first action.<sup>270</sup> The defendant must have sought and followed

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261. See *Jaffe v. Stone*, 18 Cal. 2d 146, 149, 114 P.2d 335, 337 (1941).

262. See *Brecher*, *supra* note 29, at 138-40; *infra* text accompanying note 288.

263. *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1169, 728 P.2d 1202, 1209, 232 Cal. Rptr. 567, 575 (1986); *Costantini & Nash*, *supra* note 4, at 443.

264. *Singleton v. Perry*, 45 Cal. 2d 489, 496, 289 P.2d 794, 798 (1955).

265. *Id.*

266. *Oren Royal Oaks*, 42 Cal. 3d at 1169, 728 P.2d at 1209, 232 Cal. Rptr. at 575.

Malice is difficult to prove. A plaintiff cannot show evidence of a pattern of similar improper lawsuits for the purpose of proving defendant's guilt or liability, because such a pattern is irrelevant. See CAL. EVID. CODE § 1101(a) (West 1960 & Supp. 1992); *Larson v. Larsen*, 72 Cal. App. 169, 172, 236 P. 979, 980-81 (1925). Although *Larson* was a criminal case, this principle also applies in a civil setting. *Id.* In addition, because malicious prosecution focuses on the impropriety of filing the suit without probable cause, the plaintiff's conduct after filing is also irrelevant. *Brecher*, *supra* note 29, at 127.

267. Part II.C *supra* discusses SLAPP plaintiffs' improper motivations.

268. *Albertson v. Raboff*, 46 Cal. 2d 375, 383, 295 P.2d 405, 411 (1956); *Brecher*, *supra* note 29, at 127. *Brecher* adds that an improper purpose might include suits brought "primarily because of hostility or ill will," or merely to deprive defendant "of the beneficial use of his property." *Id.* *Brecher's* ill-will category seems contrary to the *Noerr/Pennington* doctrine, at least if petitioning activity is entailed. See *supra* part IV.E.

269. *Kassan v. Bledsoe*, 252 Cal. App. 2d 810, 816, 60 Cal. Rptr. 799, 803 (1967); *Brecher*, *supra* note 29, at 126; *Costantini & Nash*, *supra* note 4, at 444 n.87.

270. *Costantini & Nash*, *supra* note 4, at 444 n.87.

the attorney's advice before commencing or maintaining the first action and must have made "full, fair and complete disclosure" to the lawyer of all relevant information known by the defendant.<sup>271</sup> Finally, the defendant must have believed that the plaintiff was liable.<sup>272</sup>

The central element in the SLAPP debate is that the first action must have been "terminated in [the plaintiff's] favor."<sup>273</sup> First, the malicious prosecution plaintiff need have won only some substantial aspect of the first action. For example, in *Sierra Club v. Superior Court*,<sup>274</sup> the court remanded the case after the Sierra Club successfully argued that an incorrect administrative standard had been used. After it won that battle, however, the Sierra Club lost the war, because the developer was eventually allowed to build.<sup>275</sup> The developer sued the Sierra Club for malicious prosecution based on the action that resulted in the remand, but the court found that the favorable termination element had not been satisfied.<sup>276</sup>

The gravamen of the "favorable" element is whether the dismissal or other termination of the first action went to the *merits*.<sup>277</sup> "A termination is therefore 'favorable' if its nature is such as to indicate the innocence of the accused. If, on the other hand, 'the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination.'"<sup>278</sup> Terminations on technical grounds such as laches, collateral estoppel or the running of the limitations period are not on the merits, whereas dismissal for lack of evidence constitutes favorable termination because it indicates that the plaintiff had no case in the first action.<sup>279</sup>

Commentator Brecher proposes that the common-law malicious prosecution action be allowed as a counterclaim in the first action, con-

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271. *Id.*

272. *Id.*

273. See *Babb v. Superior Court*, 3 Cal. 3d 841, 845, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971); accord *Jaffe v. Stone*, 18 Cal. 2d 146, 149, 114 P.2d 335, 337 (1941).

274. 168 Cal. App. 3d 1138, 214 Cal. Rptr. 740 (1985).

275. *Id.* at 1143, 214 Cal. Rptr. at 743.

276. *Id.* at 1144, 214 Cal. Rptr. at 745-46.

277. *Lackner v. LaCroix*, 25 Cal. 3d 747, 750, 602 P.2d 393, 394, 159 Cal. Rptr. 693, 694 (1979); *Jaffe*, 18 Cal. 2d at 151, 114 P.2d at 339.

278. *Asia Inv. Co. v. Borowski*, 133 Cal. App. 3d 832, 837-38, 184 Cal. Rptr. 317, 321 (1982) (quoting *Minasian v. Sapse*, 80 Cal. App. 3d 823, 826, 145 Cal. Rptr. 829, 831 (1978)).

279. *Lackner*, 25 Cal. 3d at 751-52, 602 P.2d at 395, 159 Cal. Rptr. at 695 (running of statute of limitations); *Jaffe*, 18 Cal. 2d at 150-53, 114 P.2d at 338 (dismissal for lack of evidence); *Asia Inv. Co.*, 133 Cal. App. 3d at 838, 184 Cal. Rptr. at 321 (laches); Brecher, *supra* note 29, at 126 (collateral estoppel and laches).

trary to current precedent.<sup>280</sup> A plethora of reasons for the current scheme make it an elusive target, even for Brecher. In theory, the defendant in the first action cannot pursue a cause of action for malicious prosecution in the second action until the first action is resolved in his or her favor; this is the "metaphysical difficulty."<sup>281</sup> Following this logic, allowing a malicious prosecution counterclaim in the first cause of action is essentially allowing an action before its statute of limitations has started running.<sup>282</sup> In addition, mixing malicious prosecution evidence against the plaintiff into the original action could prejudice the jury against the plaintiff's base cause of action. Furthermore, the judge will decide a counterclaim that seeks only declaratory relief, thus raising the possibility of inconsistent decisions by the court and the jury.

Malicious prosecution traditionally has been judicially disfavored.<sup>283</sup> In the interests of judicial economy, waiting for favorable termination of the first action could obviate some second actions for malicious prosecution. Finally, because of the advice-of-counsel defense and because the plaintiff's lawyer in the first action could conceivably be a co-defendant in a malicious prosecution claim, the lawyer and the client could be in conflicting positions. Thus, allowing malicious prosecution as a counterclaim in the same action could force the plaintiff to retain different counsel.

Brecher counters many of these arguments mainly by recommending bifurcation of the original claim and the malicious prosecution counterclaim, which would solve the problem of prejudicial evidence.<sup>284</sup> He also recommends that claims and counterclaims be tried by the same fact-finder—whether judge or jury—to eliminate the problem of an inconsistent verdict.<sup>285</sup> He points out that many of the claims are environmental suits or public-interest claims in which the party is seeking injunctive relief. Because statutes of limitations seek to "repose" and prevent stale claims, as do many injunctions, Brecher proposes that their goals are compatible, thus mitigating the concern with statutes of limitation expressed by the court in *Babb v. Superior Court*.<sup>286</sup> Brecher remarks that allowing malicious prosecution counterclaims could actually

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280. Brecher, *supra* note 29, at 137-40. See *Babb v. Superior Court*, 3 Cal. 3d 841, 845, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971), for current precedent.

281. *Babb*, 3 Cal. 3d at 846, 479 P.2d at 381, 92 Cal. Rptr. at 181.

282. *Id.*, 479 P.2d at 382, 92 Cal. Rptr. at 182.

283. *Id.* at 847, 479 P.2d at 382, 92 Cal. Rptr. at 182. But see *Jaffe*, 18 Cal. 2d at 159-60, 114 P.2d at 342-43.

284. Brecher, *supra* note 29, at 139.

285. *Id.*

286. 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971); Brecher, *supra* note 29, at 139.

reduce litigation, by obviating a second trial. He further contends that if public-interest or petitioning activities are involved, public policy should favor malicious prosecution counterclaims.<sup>287</sup> Such public-interest situations could be identified using the criteria set forth in California Civil Procedure Code Section 1021.5.<sup>288</sup>

With the current requirement that the first action—the SLAPP—terminate in favor of the party who will be the malicious prosecution plaintiff, the only aspect of malicious prosecution that might deter SLAPPs is the prospect of large damage awards. Although spectacular, large damage awards are rare.<sup>289</sup> Malicious prosecution has serious drawbacks for the SLAPP defendant, in particular, delay and expense. Even Brecher's proposal to allow malicious prosecution counterclaims in the SLAPP itself is viable only with bifurcation, as described.<sup>290</sup> Any comprehensive SLAPP remedy needs to intercept a SLAPP at a much earlier stage to render it ineffective. Malicious prosecution serves merely as a last resort.

### C. Other Possible SLAPP-Back Theories

SLAPP-back theories other than abuse of process and malicious prosecution are available. These include intentional infliction of emotional distress,<sup>291</sup> federal statutory civil-rights claims,<sup>292</sup> frivolous lawsuit remedies,<sup>293</sup> and the constitutional tort theory.<sup>294</sup>

The California Court of Appeal in *Laguna Publishing Co. v. Golden Rain Foundation*,<sup>295</sup> recognized "an action for damages for violation" of

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287. Brecher, *supra* note 29, at 139.

288. CAL. CIV. PROC. CODE § 1021.5 (West 1980); Brecher, *supra* note 29, at 139-40. See *supra* part II.A for a discussion of using the public interest element in SLAPP identification. See *infra* part VI.B for a discussion of recovering attorney's fees under § 1021.5.

289. For the most noteworthy of a large damage award in a SLAPP-back suit, see *supra* note 239 and accompanying text.

290. See *supra* notes 277-84 and accompanying text.

291. Costantini & Nash, *supra* note 4, at 425 n.19.

292. See, e.g., 42 U.S.C. § 1983 (1988); *Miller and Son Paving, Inc. v. Wrightstown Township Civic Ass'n*, 443 F. Supp. 1268, 1272-73 (E.D. Pa. 1978), *aff'd mem.*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979); *Lange v. Nature Conservancy, Inc.*, 601 P.2d 963, 966-67 (Wash. Ct. App. 1979), *cert. denied*, 449 U.S. 831 (1980).

293. See *supra* part IV.B for a discussion of Federal Rule of Civil Procedure 11 and California Code of Civil Procedure § 128.5.

294. See, e.g., *Laguna Publishing Co. v. Golden Rain Found.*, 131 Cal. App. 3d 816, 848-56, 182 Cal. Rptr. 813, 832-37 (1982), *appeal dismissed*, 459 U.S. 1192 (1983).

295. 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982), *appeal dismissed*, 459 U.S. 1192 (1983).

state constitutional rights "without the need for enabling legislation."<sup>296</sup> The rights in *Laguna* were those of free speech under Article I, Section 2 of the California Constitution. In the SLAPP-back in *Wegis v. J.G. Boswell Co.*,<sup>297</sup> the court recognized a constitutional tort claim based on speech and petitioning rights under the California Constitution.<sup>298</sup> Under the constitutional tort theory, the SLAPP plaintiff must have "intentionally deprived" the SLAPP defendant—now the SLAPP-back plaintiff—of his or her constitutional rights, and the deprivation must have caused damage or harm.<sup>299</sup> As constitutional speech and petitioning rights are invariably involved in a SLAPP, the constitutional tort is a particularly appropriate SLAPP-back theory.

All SLAPP-back theories share the disadvantages of delay and cost to the SLAPP defendants. Although SLAPP-backs may provide eventual vindication or, ultimately, substantial damages, their specter usually will not deter the original SLAPPS, which are designed to delay, intimidate, distract and depoliticize.<sup>300</sup> By the time the SLAPP-back is initiated, it is usually too late.

## VI. DAMAGES, ATTORNEY'S FEES AND LITIGATION COSTS

What damages, if any, can SLAPP defendants recover? Should the damage component of an anti-SLAPP scheme aim to make defendants whole, or rather to prevent plaintiffs' unjust enrichment? Defendants can obtain tort damages by suing under the SLAPP-back theories discussed previously.<sup>301</sup> Because most of these theories require a showing of

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296. *Id.* at 853, 182 Cal. Rptr. at 835. As far as the self-executing nature of the constitutional right, the *Laguna* court analogized to the self-executing right to privacy in the California Constitution. *Cf.* *White v. Davis*, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975) (applying new provision to California Constitution recognizing right to privacy against covert police surveillance of university classes); *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 828-30, 134 Cal. Rptr. 839, 841-42 (1976) (providing cause of action for unauthorized transmittal of private university transcript to scholarship and loan commission).

297. No. F011230 (Cal. Ct. App. June 14, 1991).

298. *Id.* slip op. at 10; *see also Laguna Publishing Co.*, 131 Cal. App. 3d at 853-54, 182 Cal. Rptr. at 835 (holding that California Constitution gives plaintiff right to sue for damages for infringement of right of free speech and press); Costantini & Nash, *supra* note 4, at 445-46 (citing *Laguna*).

299. *Laguna Publishing Co.*, 131 Cal. App. 3d at 857, 182 Cal. Rptr. at 837 (affording direct action for damages for intentional constitutional violation); Costantini & Nash, *supra* note 4, at 445-46. In *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), the United States Supreme Court made it clear that a person whose constitutional rights have been violated may not recover for the pure or abstract infringement of those rights; rather he or she must have suffered actual damages. *Id.* at 307-10.

300. *See supra* part II.C for a discussion of SLAPP plaintiffs' motivations.

301. *See supra* part V.

a SLAPP plaintiff's malice in pursuing the SLAPP, punitive damages may be possible. In addition, a few common-law and statutory theories are available for recovery of litigation costs and attorney's fees. The one element that the SLAPP-specific statutes or bills have in common is some provision for the recovery of costs and fees.<sup>302</sup>

*Plaintiffs* can of course recover damages—or fees under the theory in *Brandt v. Superior Court*<sup>303</sup>—if their lawsuits are not SLAPPs.<sup>304</sup> Both the Washington anti-SLAPP statute and a proposed Maryland bill allow a *plaintiff* to recover both costs and fees if the plaintiff's suit is successful.<sup>305</sup> Adding this provision to California's Lockyer bill apparently made the bill more politically palatable<sup>306</sup> and will help safeguard a plaintiff's legitimate rights to bring nonfrivolous—nonSLAPP—lawsuits.

### A. Damages

#### 1. Compensatory tort damages

SLAPP-back plaintiffs can recover their actual, out-of-pocket losses if their SLAPP-back is successful.<sup>307</sup> The most obvious out-of-pocket losses caused by a SLAPP are costs and fees. Theoretically, the SLAPP-back plaintiff can claim these in California courts under the California Supreme Court's *Brandt* theory.<sup>308</sup> *Brandt* allows recovery of attorney's fees that are in effect tort damages—fees that would not have been incurred but for the defendant's tortious action. Therefore, a SLAPP-back

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302. See WASH. REV. CODE ANN. §§ 4.24.500-.520 (West Supp. 1992); Act of Sept. 16, 1992; S. 51, *supra* note 106; A. 190, *supra* note 106; 1991 A. 10721, 215th Gen. Ass., 2d Sess. (N.Y. 1992).

303. 37 Cal. 3d 813, 693 P.2d 796, 210 Cal. Rptr. 211 (1985); see *infra* part VI.B.3 for a discussion of the *Brandt* theory.

304. At the risk of sounding circular, SLAPPs are by definition meritless, so plaintiffs who win on the merits were not in fact SLAPP plaintiffs.

305. WASH. REV. CODE ANN. § 4.24.520; S. 51, *supra* note 106. See Conn, *supra* note 43, for a discussion of the Maryland bill.

306. The Lockyer bill, in various incarnations, had been vetoed three times by Governors Deukmejian and Wilson. Governor Wilson finally approved the amended version, which was enacted on September 16, 1992. The new statute includes the following provision: "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court may award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." Act of Sept. 16, 1992 § 2 (to be codified at CAL. CIV. PROC. CODE § 425.16(c)).

307. See McEvoy, *supra* note 4, at 527.

308. *Brandt v. Superior Court*, 37 Cal. 3d 813, 819-20, 693 P.2d 796, 798, 210 Cal. Rptr. 211, 213 (1985) (holding that when insurer's tortious conduct reasonably compels insured to retain attorney to recover benefits due under policy, insurer should be liable in tort action for that offense, including attorney's fees).

plaintiff who has incurred fees to defend against a SLAPP may recover attorney's fees under *Brandt*.<sup>309</sup>

Other direct losses might include lost wages or property.<sup>310</sup> As a proximate result of the SLAPP, defendants might have lost valuable insurance coverage or access to financing.<sup>311</sup> Because lost profits are generally too speculative to calculate, a majority of jurisdictions disallow their recovery as tort damages, but California has allowed the recovery of economic losses in situations in which the losses are directly foreseeable.<sup>312</sup> SLAPP-back compensatory damages may include damage to the original SLAPP defendant's reputation.<sup>313</sup>

## 2. Emotional distress damages

Although SLAPPs certainly cause mental anguish,<sup>314</sup> it is not clear whether damages for emotional distress are recoverable. California case law does not require any physical manifestation or symptoms of emotional distress for recovery of emotional distress damages.<sup>315</sup> Malicious prosecution and abuse of process claims, however, do not seem to include mental anguish damage components, and SLAPP-back plaintiffs may not recover for violation of their constitutional rights in the abstract, without showing any actual damages.<sup>316</sup>

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309. See *id.* at 818-19, 693 P.2d at 799-800, 210 Cal. Rptr. at 214-15. Note that *Brandt* extends the allowance of fees under *Prentice v. North Am. Title Guar. Corp.*, 59 Cal. 2d 618, 620-21, 381 P.2d 645, 647, 30 Cal. Rptr. 821, 823 (1963), because the *Brandt* theory applies to two-party suits while the court in *Prentice* prohibited the allowance of attorney's fees against a defendant in a two-party lawsuit. *Id.*

310. For example, in *Wegis v. J.G. Boswell Co.*, No. FO11230, slip op. at 10-11 (Cal. Ct. App. June 14, 1991), if the defendant farmers had lost, they would have been forced to sell their farms, "thereby betraying the family's memory and future." *Costantini & Nash, supra* note 4, at 465.

311. See, e.g., *Costantini & Nash, supra* note 4, at 467-68; *supra* note 121 and accompanying text.

312. See, e.g., *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804-06, 598 P.2d 60, 63, 157 Cal. Rptr. 407, 410 (1979); *KEETON ET AL., supra* note 153, § 110, at 766-70.

313. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). If the SLAPP-back is for defamation, damage to reputation may be presumed if it is not a matter of public concern. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (plurality opinion) (holding that states may award presumed or punitive damages for defamation that does not include "matters of public concern" even without actual malice).

314. See *supra* notes 37-52 and accompanying text for a discussion of the chilling effects on SLAPP defendants.

315. *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 928-30, 616 P.2d 813, 819-21, 167 Cal. Rptr. 831, 837-39 (1980).

316. See *Stachura*, 477 U.S. at 307-10 (holding that student could only recover compensatory damages for denial of sufficient suspension procedures if student proved actual injury).



In the alternative, a SLAPP-back plaintiff could initially sue on a theory of intentional or negligent infliction of emotional distress. Expressly allowing damages for emotional distress is a possible component of an anti-SLAPP statutory scheme.

### 3. Restitutionary recovery

Victor Cosentino proposes an inverted restitutionary recovery model.<sup>317</sup> His plan is "inverted" in that the *plaintiff* will pay, and it is "restitutionary" in that it focuses on the wrongdoer's unjust enrichment, rather than on the victim's loss—as in tort—or on the victim's expected gain—as in contract.<sup>318</sup> Cosentino's plan is based on the premise that the specter of paying the defendant's fees and costs will not deter most SLAPP plaintiffs, whereas significant restitutionary awards will.<sup>319</sup> For example, if the plaintiff developer is protecting a project worth \$1 million to the plaintiff, by SLAPPING the defendant citizen group, the SLAPP will no doubt be cost-effective to the plaintiff if the plaintiff eventually need only pay out \$25,000 in fees. However, if a plaintiff developer stood to lose the entire \$1 million profit by losing the SLAPP, then presumably the plaintiff would never risk the SLAPP.

Cosentino's theory is based on true deterrence: Plaintiffs will never bring a SLAPP if they have nothing to gain. His model arrives at the starting figure for the restitutionary award by using the damage amount claimed by plaintiff in the SLAPP.<sup>320</sup> For example, if the plaintiff developer SLAPs the defendant citizen group for \$1 million in profits allegedly lost as a result of defendant's defamation, the model uses the \$1 million figure to measure the restitutionary recovery. The model also leaves room for adjustment of this figure "based on the plaintiff's ability to pay."<sup>321</sup> This restitutionary model accurately reflects the insufficiency of costs and fee awards for truly deterring SLAPPs.

Unfortunately, the drawbacks of this proposed restitutionary scheme exceed its advantages. First, the plaintiff's gain in filing the SLAPP would not be directly at the defendant's expense. In reality, this is a but-for causation issue in disguise: Would the defendant's opposition to the plaintiff's project actually have prevented the entire project but-for the SLAPP? Alternatively, without the SLAPP, would the defendant's oppositional activity only have cut into the plaintiff's profit? Obviously,

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317. Cosentino, *supra* note 16, at 417, 427.

318. See KEETON ET AL., *supra* note 153, § 94, at 672-73.

319. Cosentino, *supra* note 16, at 415-18.

320. *Id.* at 410 n.70.

321. *Id.* He provides no further explanation of this qualification.

practical difficulties of proof predominate these questions. Second and most important, the plaintiff's profit on the project comes mostly from the plaintiff's skill or investment and may be only tangentially related to the SLAPP. Therefore, such a draconian damage measurement as Cosentino recommends would excessively punish the plaintiff's wrongful SLAPP. A SLAPP plaintiff may well deserve to be punished for the damage traceable to the SLAPP, but it cannot be assumed that without the SLAPP's effectiveness the project would not have gone through anyway. The third drawback to this recovery scheme is the traditional concern that the risk of losing the plaintiff's entire profit would chill not only SLAPP plaintiffs but also plaintiffs with borderline tort claims that they believe are legitimate.

#### 4. Punitive damages

SLAPP-back plaintiffs can recover punitive damages if they can show malicious intent.<sup>322</sup> The SLAPP-back theories outlined above, such as malicious prosecution and abuse of process, are all intentional tort theories and so require wrongful intent as a *prima facie* element.<sup>323</sup> In *Wegis v. J.G. Boswell Co.*,<sup>324</sup> the plaintiff farmers were awarded \$10 million in punitive damages for malicious prosecution, abuse of process and tortious violation of constitutional rights.<sup>325</sup> Judge Neely's dissent in *Webb v. Fury*<sup>326</sup> recommends that if a SLAPP plaintiff loses at trial, the SLAPP defendant should get *more* than that defendant's full costs "if . . . it becomes apparent that the plaintiff actually was using the legal process in the same despicable way that he had alleged the defendant had [been], namely, to oppress citizens who have legitimately exercised first amendment rights."<sup>327</sup>

The amount of punitive damages traditionally is within the jury's discretion.<sup>328</sup> Judge Neely suggested in his *Webb* dissent, however, that "the court should exercise its equitable powers to impose costs against

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322. See *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); *G.D. Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 29-32, 122 Cal. Rptr. 218, 223 (1975). *Grimshaw*, the exploding Pinto case, makes clear that the malice needed for punitive damages is not evil intent, but instead "conscious disregard of the probability" that an injury to another will ensue from the actor's conduct. 119 Cal. App. 3d at 816, 174 Cal. Rptr. at 381 (quoting *Dawes v. Superior Court*, 111 Cal. App. 3d 82, 88, 168 Cal. Rptr. 319, 322-23 (1980)).

323. See *supra* part V.

324. No. F011230, slip op. at 3 (Cal. Ct. App. June 14, 1991).

325. *Id.* at 2; Costantini & Nash, *supra* note 4, at 426, 428.

326. 282 S.E.2d 28, 47 (W.Va. 1981) (Neely, J., dissenting).

327. *Id.* (Neely, J., dissenting).

328. See *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1042 (1991).

the plaintiff in excess of [the defendant's] actual loss from defending the case, in essence fining those who file frivolous cases."<sup>329</sup> Because the crucial First Amendment rights of free speech and petition are involved in the original SLAPP, jury determination of punitive amounts would seem more consistent with the policies underlying the *Beacon Theaters, Inc. v. Westover*<sup>330</sup> line of cases. In reviewing punitive damage amounts, the jury can consider a SLAPP plaintiff's wealth and degree of culpability and the possible deterrent effect of punitive damages on other similarly situated plaintiffs.<sup>331</sup>

### 5. Statutory combinations of damage measures

Anti-SLAPP statutory schemes can of course call for any combination of these damage remedies. At a minimum, most statutes or bills allow a court to award litigation costs and attorney's fees.<sup>332</sup> On the other end of the spectrum, Cosentino's proposed restitutionary damage measure would award SLAPP defendants damages in the amount of the plaintiff's anticipated profits.<sup>333</sup> SLAPP defendants may be able to recover compensatory damages and punitive damages in SLAPP-backs, but as discussed, by the time a SLAPP-back is won, the original SLAPP has long since accomplished its desired purposes of delay, expense and distraction.<sup>334</sup>

More immediate, statutorily imposed damage schemes would more effectively deter SLAPPs. The larger the amounts prescribed by statute, the more they will deter SLAPPs and support First Amendment rights. The smaller the prescribed amounts, the more they will bolster a plaintiff's rights of access to the judicial system and the less they will intrude on a plaintiff's otherwise legitimate profits. The middle ground would be to statutorily allow SLAPP defendants to recover their actual damages

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329. McEvoy, *supra* note 4, at 525 (citing *Webb v. Fury*, 282 S.E.2d 28, 47 (W.Va. 1981) (Neely, J., dissenting)).

330. 359 U.S. 500 (1959).

331. The United States Supreme Court in *Haslip*, 111 S. Ct. at 1044, and the California Court of Appeal in *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981), held that the following factors should be weighed when assessing the jury's award: (1) the reprehensibility of the SLAPP plaintiff's conduct; (2) the wealth of the defendant; (3) the amount of the compensatory damages; (4) the amount that would actually serve as a deterrent to the defendant and others; (5) the relation between the amount of the compensatory damages, any statutory penalties and the amount of punitive damages; (6) the effects on third parties; (7) the harm to defendants; and (8) all the costs of the litigation. See *Haslip*, 111 S. Ct. at 1044-45; *Grimshaw*, 119 Cal. App. 3d at 818-19, 174 Cal. Rptr. at 388.

332. See WASH. REV. CODE ANN. §§ 4.24.510-.520; Act of Sept. 16, 1992; S. 51, *supra* note 106; A. 190, *supra* note 106; A. 10721, *supra* note 302.

333. Cosentino, *supra* note 16, at 410 n.70, 417, 427.

334. See *supra* notes 56-60 and accompanying text.

proximately caused by the SLAPP—once it was identified as a SLAPP—including their damages for emotional distress, which is a major repercussion of a SLAPP. In addition, it is imperative that a statutory damage scheme provide for *both* the plaintiff and the defendant. The defendant should recover actual damages from the SLAPP and the plaintiff should in turn recover rightful damages if the suit is determined not to be a SLAPP and successfully litigated.

### B. Attorney's Fees

#### 1. The American rule

California and federal courts follow the American rule that each party in a lawsuit must pay its own attorney's fees.<sup>335</sup> The policies behind the American rule are to protect poor plaintiffs from the burden of paying their opponents' fees; to encourage parties to use the judicial system; and to relieve the court system from the administrative duty of computing costs and fees.<sup>336</sup> The rationale for the English rule,<sup>337</sup> in contrast with the American rule, is to discourage meritless actions such as SLAPPs. Under the English rule, in any case in which fees are awarded, the fees go only to the prevailing party.<sup>338</sup>

#### 2. Statutory fee awards

A provision for awarding costs and fees to SLAPP defendants is a necessary component of any anti-SLAPP statutory scheme, although the prospect of adverse fee awards may not by itself be enough to deter SLAPP plaintiffs. As discussed, one of a SLAPP's prime chilling factors on SLAPP defendants is expense.<sup>339</sup> A fee-awarding provision is the lowest common denominator of the anti-SLAPP statutes and bills surveyed for this Article.<sup>340</sup> All the existing common-law and statutory exceptions to the American rule award fees *after trial*, as discussed in

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335. See, e.g., CAL. CIV. PROC. CODE § 1021 (West Supp. 1992); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-57 (1974); Prentice v. North Am. Title Guar. Corp., 59 Cal. 2d 618, 620, 381 P.2d 645, 647, 30 Cal. Rptr. 821, 823 (1963).

336. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

337. Hensley v. Eckerhart, 461 U.S. 424, 444 (1983).

338. See, e.g., Verbaeken v. Westinghouse Elec. Corp., 881 F.2d 1041, 1052 (11th Cir. 1989), *cert. dismissed*, 493 U.S. 1064 (1990). To prevail, a party must somehow alter the legal relationship between it and the other party: It need not win on *all* issues, but merely must win on one significant issue. See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 783 (1989) (holding that teachers' victory on significant First Amendment issues, although other parts of litigation continued, was sufficient for teachers to receive fees under private-attorney-general theory).

339. See *supra* part II.C.

340. See *supra* note 332 for a list of bills and statutes.

detail below.<sup>341</sup> Very early resolution is the crucial element that a SLAPP-specific statute awarding costs and fees could add to existing exceptions.<sup>342</sup>

### 3. Common-law exceptions

Three existing common-law exceptions to the American rule are particularly applicable in the SLAPP context. First, "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons,' " the prevailing party is entitled to a fee award under the "inherent power in the courts."<sup>343</sup> This exception is particularly applicable to SLAPPs. In addition, California state courts have adopted two exceptions rejected by the federal courts: (1) fee awards for private attorneys general;<sup>344</sup> and (2) fee awards if those fees are essentially tort damages.<sup>345</sup> Because the SLAPP dynamic reverses the roles, the defendant, however, would be the recipient under these various theories.<sup>346</sup>

### 4. Statutory exceptions

Statutory exceptions to the American rule also are permitted.<sup>347</sup> The statutory authority for the fee award must be express; the judiciary does not have the power to create new exceptions *sua sponte*.<sup>348</sup> These provisions can be SLAPP-specific, as found in the recently enacted Lockyer bill,<sup>349</sup> or SLAPP parties can rely on existing fee statutes such as

341. See *infra* notes 354-72 and accompanying text.

342. See *supra* part III.C.

343. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975) (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974)). For a listing of the common-law exceptions, see *id.* at 257-60.

344. See, e.g., *Woodland Hills Residents Ass'n v. City Council*, 23 Cal. 3d 917, 925, 593 P.2d 200, 208, 154 Cal. Rptr. 503, 506 (1979); *Serrano v. Priest*, 20 Cal. 3d 25, 47, 569 P.2d 1303, 1315, 141 Cal. Rptr. 315, 327 (1977). But see *Alyeska Pipeline*, 421 U.S. at 263 (rejecting "private attorney general" exception to American rule).

345. See *Brandt v. Superior Court*, 37 Cal. 3d 813, 819-20, 693 P.2d 796, 800-01, 210 Cal. Rptr. 211, 215-16 (1985); *California Fair Plan Ass'n v. Politi*, 220 Cal. App. 3d 1612, 1617, 270 Cal. Rptr. 243, 246 (1990); *Sooy v. Peter*, 220 Cal. App. 3d 1305, 1310, 270 Cal. Rptr. 151, 154 (1990). See *supra* part VI.A for a discussion of the *Brandt* exception. Note that common-law and statutory exceptions are traditionally used to award fees to plaintiffs.

346. See *County of San Luis Obispo v. Abalone Alliance*, 178 Cal. App. 3d 848, 869, 223 Cal. Rptr. 846, 858 (1986).

347. See, e.g., CAL. CIV. PROC. CODE § 1021 (West Supp. 1992) (measuring attorney fees by agreement, except if specifically provided by statute); *Fed-Mart Corp. v. Pell Enters.*, 111 Cal. App. 3d 215, 222, 168 Cal. Rptr. 525, 528 (1980); *Lange v. Nature Conservancy, Inc.*, 601 P.2d 963, 967 (Wash. Ct. App. 1979), *cert. denied*, 449 U.S. 831 (1980).

348. See, e.g., CAL. CIV. PROC. CODE § 1021; *Alyeska Pipeline*, 421 U.S. at 263, 269.

349. Act of Sept. 16, 1992 § 2.

California Code of Civil Procedure Section 1021.5.<sup>350</sup> The primary advantage of a SLAPP-specific fee award is *immediate* review, before trial.<sup>351</sup>

Section 1021.5 represents the codification of the private-attorney-general fee recovery exception.<sup>352</sup> Usually, the statute awards fees to the plaintiff. In *County of San Luis Obispo v. Abalone Alliance*,<sup>353</sup> however, fees were awarded to the defendants because the defendants' self-interest was outweighed by an important public interest.<sup>354</sup> More specifically, the statute allows the court to award fees if:

- (1) [there is] an important right affecting the public interest:
- (a) a significant benefit . . . has been conferred on the general public . . . (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and
- (c) such fees should not in the interest of justice be paid out of the recovery.<sup>355</sup>

In determining whether the party claiming attorney's fees (the PCAF) should be awarded the fees, courts must consider the PCAF's advancement of "the public's, rather than [the party's] own private interest."<sup>356</sup> The PCAF's interest in the suit must "transcend personal self-interests."<sup>357</sup> Courts have read section 1021.5(1)(c) as requiring the PCAF to show that the cost of the suit, including fees, to the PCAF was "'out of proportion to [the PCAF's] individual stake in the matter'";<sup>358</sup> so if the PCAF's cost was *less* than the amount at issue in the case, the PCAF should not recover fees.<sup>359</sup>

Section 1021.5 is complex and so qualified by case law that it will not provide an adequate vehicle through which SLAPP defendants may recover attorney's fees.<sup>360</sup> In addition, as discussed in part II.A, the public-interest element in section 1021.5 narrows the statute's applicabil-

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350. See CAL. CIV. PROC. CODE § 1021.5.

351. See Act of Sept. 16, 1992 § 2.

352. *Serrano v. Unruh*, 32 Cal. 3d 621, 624 n.1, 652 P.2d 985, 985 n.1, 186 Cal. Rptr. 754, 754 n.1 (1982).

353. 178 Cal. App. 3d 848, 223 Cal. Rptr. 846 (1986).

354. *Id.* at 858, 223 Cal. Rptr. at 850; see Brecher, *supra* note 29, at 134.

355. CAL. CIV. PROC. CODE § 1021.5.

356. Brecher, *supra* note 29, at 140.

357. *Abalone Alliance*, 178 Cal. App. 3d at 869, 223 Cal. Rptr. at 858.

358. Brecher, *supra* note 29, at 133 (quoting *County of Inyo v. City of Los Angeles*, 78 Cal. App. 3d 82, 89, 144 Cal. Rptr. 71, 76 (1978)).

359. *Id.* at 134. Brecher notes that in *Schwartz v. City of Rosemead*, 155 Cal. App. 3d 547, 560, 202 Cal. Rptr. 400, 409 (1984), the PCAF wanted \$22,000 in fees, but the PCAF would have lost \$100,000 if the development had gone through, so the court awarded no fees. *Id.*

360. Brecher, *supra* note 29, at 136; Cosentino, *supra* note 16, at 416.

ity, thereby excluding many SLAPPs.<sup>361</sup> Many SLAPP defendants are self-interested, but their constitutional petitioning rights should still be protected.

In sum, any statutory fee provision should, within the narrow SLAPP context, broadly permit fee awards. Statutes should at a minimum provide fee awards to SLAPP defendants. In order to realistically deter SLAPPs, statutory schemes also should provide for awards of compensatory or even punitive damages.

## VII. STATUTORY REMEDIES

Recently, a compromise anti-SLAPP statute, the Lockyer bill, became law in California.<sup>362</sup> Although the political fortunes of the Lockyer bill or of the proposed anti-SLAPP statutes in other states are beyond the scope of this Article, both their political popularity and their opposition should be mentioned. The California legislature has overwhelmingly passed all of the anti-SLAPP bills.<sup>363</sup> The major California printed press have consistently endorsed the anti-SLAPP bill.<sup>364</sup> Predictably, California development interests have been wary of the anti-SLAPP bill.<sup>365</sup> Governors Deukmejian and Wilson vetoed previous versions of the Lockyer bill, on the grounds that existing protections against SLAPPs were sufficient.<sup>366</sup>

Existing protections, however, do not in practice deter SLAPPs. Because SLAPPs are not brought to *win*, remedies that prevent frivolous

361. See *supra* part II.A; Sive, *supra* note 29; Cosentino, *supra* note 16, at 421.

362. Act of Sept. 16, 1992 (to be codified at CAL. CIV. PROC. CODE § 425.16).

363. Cosentino, *supra* note 16, at 425 n.164, notes that California Senate Bill 341 (predecessor to the current statute) passed 33-5 in the Senate and 77-0 in the Assembly.

364. See, e.g., *Five Bills the Governor Should Sign*, L.A. TIMES, Oct. 9, 1991, at B6; *Putting a Stop to Unfair Suits*, S.F. CHRON., Oct. 9, 1991, at A16; *Slap Down the SLAPP Suits; Their Real Intent Is to Shut the Little Guy Up. Putting a Big Chill on Debate*, SAN JOSE MERCURY NEWS, Oct. 6, 1991, at C6.

365. Sive, *supra* note 29, notes that unfair delays could cause development projects heavy costs; but, in fact, the anti-SLAPP expediting provisions of the Lockyer bill would assist *both* defendants and plaintiffs in this respect. Hager, *supra* note 18, quotes Richard J. Lyon, a lobbyist for the California Building Industry Association, as saying that SLAPPs are "a very glamorous media issue, . . . David versus Goliath . . . but the problem that exists out there is comparatively very small, given the total development of our state." *Id.* at 31.

The other main opponent of the Lockyer bill was the California Trial Lawyers Association (CTLA). But CTLA opposed the corporate tax reform that was tacked onto the anti-SLAPP bill, not the anti-SLAPP bill.

366. Hager, *supra* note 18; *Slapping back at SLAPP suits*, *supra* note 18, at B6; Walters, *supra* note 18. Governor Wilson wrote: "I am concerned that the pleading hurdles, specifically, the evidence test, provided in this bill are higher than for deterrents for other malicious lawsuits, for example, volunteer directors [sic] immunity." Letter from Governor Wilson to the California Senate (Oct. 14, 1991) (on file with *Loyola of Los Angeles Law Review*).

claims from winning, such as SLAPP-back damages, will not discourage SLAPPS.<sup>367</sup> Delay is a prime goal of SLAPP plaintiffs, and existing remedies are usually slow, ranging from summary judgment after discovery, to SLAPP-backs after trial.<sup>368</sup> Only accelerating judicial review of a potential SLAPP's merits will provide a real disincentive. Furthermore, existing remedies do not prevent the chilling effect of SLAPPS on the exercise of constitutional speech and petitioning rights, which are vital to preserving participatory democracy.<sup>369</sup>

Finally, a statutory approach is more appropriate than a decisional or rule-of-court approach because SLAPP disputes are quintessentially political.<sup>370</sup> As discussed, SLAPP plaintiffs intend to remove the dispute from the political and public arenas to the courtroom. There they can better control the balance of power. And a protracted, arcane litigation process may help remove the dispute from the public eye.<sup>371</sup>

Opponents of SLAPP-specific statutory remedies are especially concerned about inhibiting plaintiffs' constitutional rights of access to the legal system. But SLAPPS are by definition frivolous suits over which such a constitutional protection would not extend.<sup>372</sup> Thus, to protect plaintiffs' rights of access to the courts, anti-SLAPP statutes must carefully identify SLAPPS.<sup>373</sup> Existing remedies such as malicious prosecu-

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367. See *supra* part II.C, for a more detailed discussion of SLAPP plaintiffs' motivations for bringing SLAPPS.

368. See *supra* parts III.B, IV, V.

369. *United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967); Cosentino, *supra* note 16, at 406-08.

370. *Webb v. Fury*, 282 S.E.2d 28, 43 (W. Va. 1981) (characterizing underlying dispute as "a vigorous exchange of ideas which is more properly within the political arena"). See Cosentino, *supra* note 16, at 428, and *supra* part II.C for a discussion of SLAPPS' depoliticization of the issues involved.

Some, such as politicians not wishing to incur the political disfavor of business interests, may prefer that this delicate issue be relegated to the courts. Although courts traditionally avoid political questions, SLAPPS do involve the frivolous use of the judicial system, and courts have not been reluctant to use their power to dismiss SLAPPS. See, e.g., *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972); *Webb*, 282 S.E.2d 28. Under the Supreme Court's analysis of political questions in *Baker v. Carr*, 369 U.S. 186 (1962), courts have apparently had no difficulty finding judicially discoverable and manageable standards for resolving the issues presented by SLAPPS. With First Amendment rights being the most salient legal issues involved, there is certainly no "textually demonstrable commitment" of exclusive power by the Constitution to one of the political branches. Judicial involvement would not be disrespectful of the legislature's territory, or an embarrassing usurpation of its power. See *Baker*, 369 U.S. at 217. Hence, the arguments for keeping regulation of SLAPPS in the political branches are policy arguments as opposed to strictly legal ones.

371. See *supra* text accompanying notes 52-58.

372. See *supra* notes 212-23 and accompanying text for a discussion of the *Noerr/Pennington* sham exception.

373. See *supra* part II for a discussion of identification issues.



tion "often require defendants to go to trial and spend substantial amounts of money and time in order to prevail. Rather than incur the expense and the trauma, many citizens withdraw. Others, scared off by the threat of lawsuits, never enter the fray at all."<sup>374</sup>

The single, most pivotal benefit that statutory solutions to the SLAPP problem offer is a very early resolution of the claim.<sup>375</sup> To do this, legislation must specify criteria by which to identify potential SLAPPs. Anti-SLAPP statutes and bills commonly single out suits that involve and possibly threaten a defendant's First Amendment rights of free speech and petitioning for redress.<sup>376</sup> The public-interest-related element is the second most frequent threshold identification factor in anti-SLAPP legislation.<sup>377</sup> As discussed, limiting the scope of an anti-SLAPP provision to public-interest-related litigation can provide too wide a loophole for SLAPP plaintiffs, because SLAPP defendants petitioning the government are almost always motivated by *some* self-interest.<sup>378</sup> New Jersey's Russo bill creates two classes of SLAPP defendants: (1) those who communicate to a public entity about anything "reasonably of concern" to that entity; and (2) those who express opinions "concerning a public issue which affects" them.<sup>379</sup> Only with the second class does the bill specify a public issue, although issues in the first class must concern a public entity. Because California's recently enacted Lockyer bill already exempts any publicly prosecuted litigation,<sup>380</sup> it should eliminate the prerequisite that the potential SLAPP must be "in connection with a public issue" to be covered.<sup>381</sup>

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374. *Slapping back at SLAPP suits*, *supra* note 18, at B6.

375. See *supra* part III.C for a discussion of expedition of initial judicial review. For example, a provision of the recently enacted Lockyer bill allows the court to review a potential SLAPP on its merits soon after filing, before discovery. Act of Sept. 16, 1992 § 2 (to be codified at CAL. CIV. PROC. CODE § 425.16(b)). At that time, the court examines the pleadings and supporting affidavits from both sides to determine whether "there is a probability that the plaintiff will prevail on the claim." *Id.*

376. See WASH. REV. CODE ANN. §§ 4.24.500-.520 (West Supp. 1992); Act of Sept. 16, 1992 § 2 (to be codified at CAL. CIV. PROC. CODE § 425.16(b)) (specifying the "right of petition or free speech under the United States or California Constitution"); S. 51, *supra* note 106; A. 190, *supra* note 106. The California, New Jersey and Washington statutes each have policy-statement preambles that decry the chill of SLAPPs on public participation.

377. See *supra* part II.A for further discussion of the public-interest element.

378. *Sierra Club v. Butz*, 349 F. Supp. 934, 938 (N.D. Cal. 1972); *Webb v. Fury*, 282 S.E.2d 28, 40-41 (W. Va. 1981); Cosentino, *supra* note 16, at 401.

379. A. 190, *supra* note 106.

380. Act of Sept. 16, 1992 § 2. California Code of Civil Procedure § 425.16(d) will provide that "any enforcement action brought in the name of [Californians] by the Attorney General, district attorney, or city attorney, acting as a public prosecutor" will not be covered by the anti-SLAPP statute. *Id.*

381. *Id.* (to be codified at CAL. CIV. PROC. CODE § 425.16(b)).

What an anti-SLAPP statute should really address is not whether the defendant's petitioning concerns a public issue, but whether it is in good faith. The Washington statute covers only "a person who in good faith communicates a complaint or information to any" government body.<sup>382</sup> The New Jersey bill contains identical language and adds that a defendant must also be without actual malice.<sup>383</sup> Analogously, the Maryland bill also requires good faith on the defendant's part.<sup>384</sup> Although the *Noerr/Pennington* doctrine already protects against bad-faith or sham petitioning,<sup>385</sup> California's newly enacted statute could sensibly add this qualification of threshold petitioning activity.

#### VIII. COMBINING REMEDIES TO CREATE THE BEST ANTI-SLAPP STATUTE FOR CALIFORNIA

The Lockyer bill contains three crucial features.<sup>386</sup> First, the anti-SLAPP protection is triggered by involvement of the defendant's First Amendment rights of speech and petitioning, under either the Federal or California Constitution. Most crucial, the bill provides for judicial review at a very early stage. Once the pleadings are filed and the suit is identified as a potential SLAPP, involving First Amendment rights, both sides can submit affidavits. The court will then evaluate the merits of the case using the "probability" test.<sup>387</sup> Finally, a SLAPP defendant may recover any litigation costs and attorney's fees, upon dismissal, from the plaintiff.

The Lockyer bill further provides that if a SLAPP defendant motions to strike frivolously or "solely . . . to cause unnecessary delay," then the plaintiff may recover costs and fees. The court uses a section 128.5 standard for this determination.<sup>388</sup> Discovery also is suspended until the court decides on the special anti-SLAPP motion to strike.<sup>389</sup>

Several possible additions and modifications to the California statute arise from the foregoing discussions of common-law and statutory solutions to the SLAPP problem.

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382. WASH. REV. CODE ANN. § 4.24.510 (West Supp. 1992).

383. A. 190, *supra* note 106.

384. S. 51, *supra* note 106.

385. See *supra* part IV.E for a discussion of the *Noerr/Pennington* sham exception.

386. Act of Sept. 16, 1992. See generally *Lawmaker Renews Push Against "Strategic" Suits*, L.A. TIMES, Feb. 20, 1992, at B2 (announcing renewed effort to enact anti-SLAPP legislation).

387. See *supra* part III.C for a discussion of the "probability" test.

388. Act of Sept. 16, 1992 § 2 (to be codified at CAL. CIV. PROC. CODE § 425.16(c)). See *supra* part IV.B.3 for a discussion of California Code of Civil Procedure § 128.5.

389. Act of Sept. 16, 1992 § 2 (to be codified at CAL. CIV. PROC. CODE § 425.16(g)). See *supra* part III.B for a discussion of the discovery issues.

1. **ELIMINATE ANY THRESHOLD PUBLIC-INTEREST-RELATED ELEMENT.** As far as the threshold identification of a SLAPP, which would trigger the bill's coverage, the public-interest element<sup>390</sup> should be eliminated in order to avoid excluding self-interested but legitimate petitioning activity by a SLAPP defendant.
2. **REQUIRE SPECIFIC PLEADING.** To facilitate the initial judicial review, where constitutional speech or petitioning rights are involved, the statute should mandate specific pleading.<sup>391</sup>
3. **USE A SUBSTANTIAL POSSIBILITY TEST.** Rephrase "probability" as "substantial possibility." The handful of SLAPPs dismissed under Rule 12(b)(6)<sup>392</sup> would have failed a substantial *possibility* screen—usually because they lacked a *prima facie* element—let alone a probability test. This alteration would not significantly dilute the statute, but would be politically expedient.<sup>393</sup>
4. **AWARD REAL DAMAGES TO DEFENDANTS.** Most critical for SLAPP defendants, the legislation should award actual, out-of-pocket, tort damages to SLAPP defendants, rather than just costs and fees.<sup>394</sup> A defendant's damage measurements should allow for emotional distress recovery—an inevitable consequence of a SLAPP—but not for punitive damages. Punitive damages should be available if the defendant is willing to subsequently pursue a SLAPP-back<sup>395</sup> at the defendant's own expense.
5. **AWARD DAMAGES TO A PREVAILING PLAINTIFF.** This and the next suggested addition to the current statute are important for preserving fairness for SLAPP plaintiffs. The statute should award a plaintiff reasonable damages if the plaintiff prevails.<sup>396</sup> Currently, plaintiffs may recover costs and fees "if the court finds that [the defendant's] special motion to strike is frivolous or is solely intended to cause unnecessary delay."<sup>397</sup> This may not be enough.
6. **DEFENDANT MUST PETITION IN GOOD FAITH TO BE PROTECTED.** The statute should protect a defendant's constitutional petitioning

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390. See *supra* part II.A. California Code of Civil Procedure § 425.16(b) will cover only First Amendment activity "in connection with a public issue." Act of Sept. 16, 1992.

391. See *supra* part III.A.

392. FED. R. CIV. P. 12(b)(6); see, e.g., *supra* text accompanying note 91.

393. See *supra* text accompanying note 98.

394. See *supra* part VI.A. Defendant's damages should serve to make defendant whole, rather than to relieve the SLAPP plaintiff of any unjust enrichment. See *supra* discussion following note 331.

395. See *supra* note 322-31 and accompanying text.

396. See *supra* text accompanying note 306.

397. Act of Sept. 16, 1992 § 2 (to be codified at CAL. CIV. PROC. CODE § 425.16(c)).

activity only if that activity is in good faith and not merely to harass or to improperly obtain an advantage over the plaintiff.<sup>398</sup>

7. ALLOW STATE INTERVENTION ON THE DEFENDANT'S BEHALF.<sup>399</sup> The intervention could be permissive—at the government agency's discretion—or mandatory, where the agency would statutorily be a necessary party to the litigation.
8. PROVIDE UP-FRONT PAYMENT OF DEFENDANT'S DISCOVERY COSTS. If a potential SLAPP survives the initial early review, yet the court still recognizes its potential as a SLAPP, then the court should order the plaintiff to advance the defendant's discovery costs if and only if the defendant can demonstrate its inability and plaintiff's ability to pay these costs.<sup>400</sup> The statute allows suspension of discovery while the court is deciding the motion to strike, but this may not eliminate the intimidation and expense factors associated with burdensome discovery in a SLAPP.
9. GUARANTEE EXISTING INSURANCE COVERAGE. Finally, an anti-SLAPP statute cannot permit a SLAPP defendant's existing insurance coverage to dry up as a result of filing the SLAPP.<sup>401</sup> This could be accomplished by mandating continued coverage, unless other unrelated underwriting factors have changed. If the lawsuit is a SLAPP, the requirement to maintain coverage cannot harm the insurance carrier because the insured defendant will inevitably prevail, thus incurring no insurable losses. Another possible method of ensuring continued coverage would be through a state insurance fund, possibly funded by fees charged to unsuccessful SLAPP plaintiffs.

## IX. CONCLUSION

SLAPPs are difficult to deter because their plaintiffs are not motivated by winning the claim. Instead, SLAPP plaintiffs wish to tie up the defendants as long as possible and to drain them of their financial, political and sometimes personal resources in the process. Existing remedies, from sanctions for frivolous lawsuits to SLAPP-back theories such as malicious prosecution, are not designed for such a situation in which the plaintiff has no expectation of winning, but sues merely to take up the defendant's time and money. Supplemental statutory remedies are essen-

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398. See *supra* part IV.E for a discussion of the *Noerr/Pennington* sham exception.

399. See *supra* part III.E.

400. See *supra* part III.B.

401. See *supra* part IV.A; text accompanying note 121.

tial to provide for judicial review at an early enough stage in a SLAPP to render it useless.

An anti-SLAPP statute must include several provisions that protect a plaintiff's right of access to the courts. SLAPPs must be defined narrowly, focusing on suits challenging a defendant's constitutional right of free speech and petition. A prevailing plaintiff should be guaranteed the same compensatory damages or costs and fee awards as defendants may now recover under various statutes and bills. The threshold review should only screen out those suits that lack any substantial possibility of success on their merits. Finally, the *Noerr/Pennington* sham exception to the right to petition should be codified in the anti-SLAPP statute, which should cover only good faith petitioning.

Along with the other minor recommendations outlined above—specific pleading, state intervention, discovery costs in advance and state-guaranteed continuation of insurance coverage—this statutory blueprint strikes a fair balance between a plaintiff's right of access to the courts and a defendant's rights of free speech and petitioning. The point here must not be to stop developers or polluters but to allow the *political* process to evaluate their projects that impact their neighbors and their communities. A statute including all the preceding provisions should effectively deter SLAPPs, a mission for which existing judicial remedies are inadequate.